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No. 82-97

In the Supreme Court of the United States

OCTOBER TERM, 1981

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,

Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Copyright Royalty Tribunal may lawfully establish a compulsory copyright license fee for coin-operated phonorecord players that is essentially a monopoly price, when Congress explicitly denied full monopoly protection for this copyright use under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*?

2. Whether the Copyright Royalty Tribunal may ignore the collective financial condition and costs of copyright owners in establishing a compulsory copyright license fee, which, under the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, must afford a "fair return" to copyright owners?

3. Whether the Copyright Royalty Tribunal may lawfully provide for automatic interim adjustments to an existing compulsory copyright license fee, when the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, provides that the Tribunal may adjust fees only once every ten years?

THE PARTIES

Petitioner Amusement and Music Operators Association is a national, nonprofit trade association of operators, manufacturers, and distributors of coin-operated phonorecord players, commonly known as jukeboxes, and other coin-operated amusement devices. Petitioner is incorporated in the State of Delaware and has no parent or affiliated corporation. Respondent Copyright Royalty Tribunal is a federal administrative agency established by the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.* The other parties who participated in the proceedings below are: The American Society of Authors, Composers, and Publishers; Broadcast Music, Inc.; and SESAC, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Amusement and Music Operators Association petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-32a) is reported at 676 F.2d 1144. The final rule of the Copyright Royalty Tribunal (App. B, *infra*, 33a-34a) is published at 37 C.F.R. § 306 (1981). The Tribunal's explanation of the rule (App. C, *infra*, 35a-63a) is published at 46 Fed. Reg. 884 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*, are set forth in Appendix D hereto. The Tribunal's final rule, which is published at 37 C.F.R. § 306 (1981), is set forth in Appendix B hereto.

STATEMENT OF THE CASE

Introduction

On January 5, 1981, the Copyright Royalty Tribunal published a final rule adjusting the compulsory copyright license fee for coin-operated phonorecord players, which are commonly called "jukeboxes" (App. B, *infra*, 33a-34a). Prior to 1976, when Congress enacted the Copyright Revision Act, 17 U.S.C. § 101 *et seq.*, the copyright laws generally had exempted jukebox owners from paying copyright royalties for public performances of copyrighted works on jukeboxes. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, however, Congress determined that jukebox owners should pay a compulsory copyright license fee of $8.00 per jukebox per year, beginning in 1978. 17 U.S.C. § 116(b)(1). Congress also directed the Copyright Royalty Tribunal, which was established under the 1976 Act (17 U.S.C. § 801(a)), to begin rulemaking proceedings in January 1980 to determine whether any adjustment to the $8.00 statutory fee was required under the criteria set forth in 17 U.S.C. § 801(b)(1). The Tribunal is authorized to undertake similar rulemaking proceedings in 1990 and at ten-year intervals thereafter. 17 U.S.C. § 804(a).

At the completion of its 1980 rulemaking proceedings, the Tribunal concluded that the statutory fee should be increased to $50.00 per jukebox per year. The Tribunal found that the new fee should be phased-in, starting at $25.00 for 1982 and 1983, and then rising to $50.00 for the years 1984 through 1986 (App. B, *infra*, 33a). The Tribunal also concluded that the $50.00 fee should be adjusted in 1987 to reflect pre-1987 changes in the Consumer Price Index (App. B, *infra*, 34a). The Tribunal thus increased the fee set by Congress by at least 525%, and perhaps more, depending upon future increases in the Consumer Price Index.

On April 16, 1982, the United States Court of Appeals for the Seventh Circuit denied review of the Tribunal's rule (App. A, *infra*, 32a). Thus, the Tribunal's construction of these provisions cannot be challenged again for at least ten years, when new adjustment proceedings may be held. 17 U.S.C. § 804(a)(2)(C).

The Parties

Petitioner Amusement and Music Operators Association ("AMOA") is a national trade association of over 2100 operators, manufacturers, and distributors of jukeboxes and other coin-operated amusement devices. Respondent Copyright Royalty Tribunal is a federal administrative agency which Congress established in 1976 "to make determinations concerning [among other things] the adjustment of reasonable copyright royalty rates." 17 U.S.C. § 801(b)(1). The American Society of Authors, Composers, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc. are three music "performing rights societies"—private associations of composers and artists—who participated in the rulemaking proceedings at issue here.

Statutory Background

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, permits authors and composers to copyright most songs and melodies ("nondramatic musical works"), but does not invariably grant such persons an absolute right either to preclude use of their property or to exact monopoly compensation for such use. Under the Act's "compulsory licensing" scheme, such copyright owners are required to license their works to jukebox operators at a price set by statute. 17 U.S.C. § 116. In particular, the Act requires that each jukebox operator file an application for a compulsory license with the Register of Copyrights and "deposit . . . a royalty fee for the current calendar year of $8.00 for [each] phonorecord player." 17 U.S.C. § 116(b)(1). After these fees are collected by the Copyright Office, they are to be distributed in due course to copyright owners, primarily through performing rights societies. 17 U.S.C. § 116(c).

The Act also provides for the periodic review and adjustment of the compulsory license royalty fee by the Tribunal, in accordance with several specified criteria. *See* 17 U.S.C. § 801(b)(1)(A)-(D). Thus, the Tribunal was required in 1980 to commence rulemaking proceedings to determine whether continued compliance with the statutory criteria required any adjustment in the compulsory copyright license fee for jukeboxes. 17 U.S.C. § 804(a). The Act further provides that subsequent adjustment proceedings may be held, upon petition by any person having a "significant interest" in the outcome, "in 1990 and in each subsequent tenth calendar year" thereafter. 17 U.S.C. § 804(a)(2).

Tribunal Proceedings

Pursuant to its statutory mandate, the Tribunal published a notice of rulemaking in the Federal Register on January 2, 1980 (45 Fed. Reg. 62), and thereafter con-

ducted a seven-day hearing concerning the jukebox royalty fee. *See* App. C, *infra*, 36a. AMOA, ASCAP, BMI, and SESAC participated in the hearing. App. C, *infra*, 36a. AMOA presented evidence to show that continued compliance with the statutory criteria required no adjustment of the $8.00 fee. App. C, *infra*, 42a-44a.[1] AMOA emphasized (*see* App. C, *infra*, 48a) that the Tribunal was statutorily required to ascertain whether, among other things, the license fee "afford[ed] the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions." *See* 17 U.S.C. § 801(b)(1)(B). AMOA therefore produced evidence to show the precarious financial condition of the jukebox industry, and argued that the Tribunal must also examine the costs and economic conditions of the copyright owners. In particular, AMOA contended that the Tribunal must pierce the veil of the performing rights societies, and consider the collective costs and financial condition of the ultimate copyright owners themselves. *See* App. C, *infra*, 48a.

The Tribunal rejected AMOA's view and instead found "the ASCAP/SESAC *concept* of basing the rate on marketplace analogies to be most attractive." App. C, *infra*, 52a (emphasis in original). ASCAP and SESAC had argued that Section 801(b) of the Act, 17 U.S.C. § 801(b), required the establishment of "a compulsory license fee similar to the fee which would be reached on the open

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[1] AMOA also contended, as the Seventh Circuit noted, that "the burden of proof to justify any increase above the $8.00 fee set by Congress rested on the copyright owners" (App. A, *infra*, 5a). The court of appeals, however, approved the Tribunal's holding "that *none* of the parties had the burden of proof in the initial mandatory hearing" (App. A, *infra*, 6a; emphasis in original).

marketplace if performing rights societies and jukebox operators were free to negotiate for licenses absent a compulsory license." App. C, *infra*, 37a. ASCAP and SESAC suggested that three "marketplace analogies" were sufficient to make this determination (App. C, *infra*, 37a): "(a) general establishments, such as bars, grills, restaurants and taverns using mechanical music (i.e., music provided by non-live means); (b) background music services; and (c) foreign jukebox operators." Relying only on these three "marketplace analogies," ASCAP and SESAC argued that the royalty fee should be increased from $8.00 to $70.00. App. C, *infra*, 36a.

The Tribunal found these "marketplace analogies" sufficient to provide "an appropriate benchmark" for the jukebox royalty fee. App. C, *infra*, 53a. The Tribunal noted, however, "that some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues." App. C, *infra*, 53a. Thus, the Tribunal concluded (App. C, *infra*, 57a):

> On the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria, the Tribunal has adjusted the royalty rate for coin-operated phonorecord players to $50 per machine. The rate takes into account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators.

Finally, the Tribunal rejected AMOA's contention that the Act provides no authority for making interim fee adjustments. App. C, *infra*, 46a-48a. Thus, the Tribunal set the fee at $25.00 per jukebox per year for 1982 and 1983, at $50.00 for the years 1984 through 1986, and at

$50.00, subject to an inflation adjustment, for the years 1987 through 1990. App. C, *infra*, 53a-54a.

Seventh Circuit Review Proceedings

AMOA and ASCAP each filed petitions for review in the United States Court of Appeals for the Seventh Circuit.[2] Both petitions were denied. *See* App. A, *infra*, 32a.

AMOA challenged the Tribunal's rule on several grounds, including the three grounds upon which it seeks review here.[3] First, AMOA argued that the Tribunal erred in relying upon the three so-called "marketplace analogies" as the price benchmark for jukebox royalty fees because "the allegedly 'analogous' fees in each situation were established under the protection of government-granted monopoly rights . . . rather than in a free competitive

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[2] ASCAP argued that the Tribunal's $50.00 fee was outside the "zone of reasonableness" and that the lowest reasonable fee was $70.00. *See* App. A, *infra*, 25a. ASCAP also asserted that the Tribunal erred in phasing in the new fee, claiming that the $50.00 fee, if reasonable, should have been established immediately. *See* App. A, *infra*, 22a. BMI appeared as a party-respondent, supporting the final rule against AMOA's objections, but taking no position as to ASCAP's contentions. SESAC did not appear as a party in the court of appeals.

[3] AMOA also challenged the Tribunal's findings on the grounds that: (1) the so-called "marketplace analogies" were not sufficiently comparable to jukebox copyright use (C.A. Br. at 40); (2) the Tribunal ignored extensive evidence concerning the financial plight of the jukebox industry (*id.* at 44); and (3) the Tribunal's decision improperly relied upon information contained in a letter that was not part of the administrative record (*id.* at 65). AMOA also argued that the increase was not supported by "substantial evidence," and that the performing rights societies had not carried the burden of justifying it. *Id.* at 36, 43.

market." App. A, *infra*, 26a; *see* AMOA C.A. Br. at 40.[4] Second, AMOA asserted that the Tribunal erred in refusing, for the purpose of calculating a "fair return" to copyright owners, to accept any evidence concerning the collective costs or financial condition of copyright owners. C.A. Br. at 52. Third, AMOA contended that the Tribunal's decision to adopt an interim inflation adjustment violated the Act. *Id.* at 56.

The Seventh Circuit rejected each of these contentions. First, the court held (App. A, *infra*, 27a; emphasis added) that the "*arguably* analogous musical fees provided substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark." Second, the court held (App. A, *infra*, 30a) that the Tribunal properly declined to consider any evidence concerning the costs and financial conditions of copyright owners because "it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material,"

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[4] The Act provides full monopoly protection to composers and performers with respect to both: (a) "mechanically" recorded music played in establishments such as restaurants, and (b) "background" music supplied by wire, radio, or other means to business and commercial subscribers. 17 U.S.C. § 106. With respect to these uses, copyright owners have absolute discretion in licensing their works and may exact monopoly prices. The license fees paid by jukebox operators in foreign countries are also set in a monopoly context. As the Tribunal noted (App. C, *infra*, 40a): "[T]he [foreign] fees are either negotiated with industry groups or are subject to governmental approval."

and also because "the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act." Third, the court held (App. A, *infra*, 22a) that the interim inflation adjustment "merely demonstrate[s] a flexibility with which Congress intended to endow the Tribunal in making its determinations." Thus, the court of appeals found "no fault with the Tribunal's final rule as promulgated" (App. A, *infra*, 32a).

REASONS FOR GRANTING THE WRIT

The Tribunal's final rule, which has increased by at least 525% the fee that Congress thought appropriate for imposition just four years ago, is inconsistent not only with the plain language and legislative history of the Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, but also with numerous decisions of this and other courts. Moreover, the decision of the court below, which upheld the rule in all respects, constitutes the definitive interpretation of various provisions of the Act, which cannot be challenged anew at least until 1990, when the Tribunal may again undertake rulemaking in this area. Nonetheless, the construction of the Act and general legal principles endorsed by the court below doubtless will be cited as authority in future rulemaking proceedings under other provisions of this and other statutes.

I. The Tribunal's Establishment Of What Is Essentially A Monopoly Price For A Copyright Use With Respect To Which Congress Explicitly Denied Monopoly Protection Is Inconsistent Both With The Act And With General Legal Principles.

The Copyright Revision Act of 1976, 17 U.S.C. § 101 *et seq.*, establishes three levels of copyright protection. First, and as a general rule, the Act provides complete monopoly protection, pursuant to which copyright owners may either preclude use of their property or exact whatever charge they can obtain for its use. 17 U.S.C. § 106. Second, when copyrighted material is used pursuant to the "fair use" provisions of the Act, copyright owners must submit to the use of their property without receiving

any compensation at all. *See* 17 U.S.C. §§ 107-110. Third, under the "compulsory licensing" provisions of the Act, which are applicable to jukeboxes, copyright owners must allow others to use their works in exchange for compensation that is specifically set by statute. *See, e.g.*, 17 U.S.C. § 116. The Tribunal's final jukebox royalty rule is utterly inconsistent with this congressional scheme.

In raising the jukebox compulsory copyright license fee by at least 525%, the Tribunal relied solely upon the three so-called "marketplace analogies" suggested by the performing rights societies. *See* page 6, *supra*. In fact, however, the "marketplace analogies" that the Tribunal found conclusive are all instances of monopoly pricing. For example, the Act specifically grants absolute monopoly protection to composers and performers of "background music," who therefore may exact monopoly compensation for the use of their property. *See generally* 17 U.S.C. § 106.[5] Jukeboxes, by contrast, are one of a handful of copyright uses for which Congress specifically denied full monopoly protection and instead chose to establish a compulsory licensing scheme, which takes into account not only the needs of copyright owners, but also those of copyright users and the general public. 17 U.S.C. § 116.[6]

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[5] As previously noted (*see* page 8 n.4, *supra*), the other two analogies used by the Tribunal—"mechanical" recordings played in restaurants and jukebox license fees paid in foreign countries—are also examples of monopoly pricing.

[6] Compulsory licensing is applicable to jukeboxes and three additional copyright uses: (a) secondary transmissions by cable television systems (17 U.S.C. § 111); (b) mechanical reproduction of musical records and tapes that have been distributed to the public (17 U.S.C. § 115); and (c) use of copyrighted materials by noncommercial educational broadcasters (17 U.S.C. § 118). Congress obviously intended compulsory licensing as an intermediate level between uncompensated "fair use" and full monopoly protection.

Until 1976, when Congress established the compulsory licensing scheme for jukeboxes, jukebox owners had generally been exempt from any special requirements under the copyright laws. *See* 17 U.S.C. § 1(e) (1976) (repealed). In 1976, therefore, Congress clearly intended to improve the position of copyright owners by allowing them, for the first time, to receive some return for the use of their works by jukebox operators, but not the monopoly profits that they would receive from full copyright protection.[7] Indeed, Congress specifically directed the Tribunal to set a reasonable rate by, among other things, accommodating both the interests of copyright owners (who naturally want a monopoly price) and those of copyright users (who naturally prefer a lower price). *See* 17 U.S.C. § 801(b)(1)(A)-(D).

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[7] Commentators have repeatedly emphasized that compulsory licensing is a direct limitation on monopoly control and pricing. *See, e.g.*, Seltzer, *Exemptions and Fair Use in Copyright: The "Exclusive Rights" Tensions in the New Copyright Act*, 24 Bull. of Copyright Soc. 215, 261 (1977) ("Having first come to a decision that there are appropriate copyright interests . . . to be reallocated, Congress has two ways of dealing with an exception from the scheme: (1) either by altogether exempting certain uses from payment or permission, thereby concluding that no further reliance on the copyright scheme incentives is either needed or warranted; or (2) by substituting statutory for author controls of access and price (compulsory licensing), reaffirming the essential reliance on the copyright-scheme monetary incentives."); N. Boorstyn, *Copyright Law* § 5:12 at 146 (1981) ("'[C]ompulsory licensing' . . . was established to encourage the widespread mechanical, or recorded, use of music and to prevent absolute control of popular music by the copyright owners thereof.").

In this rulemaking, however, the Tribunal established the jukebox fee simply by ascertaining the monopoly price that would be charged absent compulsory licensing (which it mistakenly believed to represent a "marketplace" price). The Tribunal then slightly discounted that price to take into account the financial condition of the jukebox industry, but provided no methodological support for the final fee that it selected.[8] By setting the jukebox licensing rate at what is essentially a monopoly price, the Tribunal effectively established a monopoly price with respect to a copyright use for which Congress explicitly denied monopoly protection. Thus, the Tribunal has produced an inefficient level of copyright use—which Congress specifically sought to avoid—and has defeated the very purpose of the Tribunal's existence. *See* page 15 & n.10, *infra*. Moreover, by creating a result through administrative regulation that Congress explicitly rejected when it established

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[8] The Tribunal lowered the jukebox fee from the $70.00 benchmark proposed by ASCAP and SESAC to $50.00, not because the Tribunal desired to account for the fact that $70.00 was a monopoly price, but rather because the Tribunal believed that the "analogies" were not *completely* comparable to jukebox copyright use, and also because it was concerned about possible harm to the jukebox industry. *See* App. C, *infra*, 52a-53a; *see also* page 6, *supra*. In other words, the Tribunal was concerned not that $70.00 was a monopoly price, but that $70.00 was not necessarily the monopoly price which the marketplace would set for jukeboxes in the absence of compulsory licensing. Inasmuch as the Tribunal issued no contemporaneous methodological explanation for the fee that it set, any new explanation would now constitute mere *"post hoc* rationalizations of the agency [which] . . . cannot serve as a sufficient predicate for agency action." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 539 (1981).

the copyright regulatory scheme, the Tribunal unlawfully exceeded the powers that Congress delegated to it.[9]

The Tribunal's complete reliance on monopoly price analogies, which the Seventh Circuit unreservedly approved, is inconsistent not only with the clear intent of the Act, but also with numerous decisions in which this Court has held that government grants of monopoly protection, particularly in the area of intellectual property, must be construed narrowly. *See, e.g., Hotchkiss* v. *Greenwood*, 52 U.S. (11 How.) 248, 267 (1851) (patent protection limited to those inventions which, in addition to being new and useful, required "more ingenuity and skill . . . than were possessed by an ordinary mechanic acquainted with the business"); *Baker* v. *Selden*, 101 U.S. 99 (1880) (copyright protection held not to extend to ideas); *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) (piano rolls, "mechanical" reproductions of copyrighted musical compositions, held not to be "copies" within meaning of prior Act); *Graham* v. *John Deere Co. of Kansas City*, 383 U.S. 1, 19 (1966) (emphasizing the importance of non-obviousness for patent protection: "He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office.").

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[9] Had Congress simply intended for jukebox owners to pay monopoly royalties, it would have enacted provisions for jukeboxes similar to those applicable to copyright use by noncommercial broadcasters, who are encouraged to negotiate license agreements with copyright owners (*see* 17 U.S.C. § 118(b)(2)). The Tribunal establishes mandatory fees for copyright use by noncommercial broadcasters only in cases where licenses have not been negotiated privately. In such cases, the Act provides (17 U.S.C. § 118(b)(3)) that "the Copyright Royalty Tribunal may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in [17 U.S.C. § 118(b)(2)]."

Moreover, the decision below conflicts with numerous decisions in which other courts of appeals have recognized that the central purpose of compulsory licensing is to prevent the deleterious effects on pricing and consumption which monopoly control typically engenders.[10] *See, e.g., Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975) ("Congressional intent [in establishing compulsory licensing of mechanical reproduction] was apparently twofold: to encourage future creative endeavor and to combat monopolization in the music industry"); *Norbay Music, Inc.* v. *King Records, Inc.*, 290 F.2d 617, 618 (2d Cir. 1961) (with regard to mechanical reproduction, "the distrust of monopoly was so great that the form of remedy chosen was that of the famous compulsory license"); *Todamerica Musica, Ltda.*, v. *Radio Corporation of America*, 171 F.2d 369, 371 (2d Cir. 1948) ("[T]he right of a copyright owner to protect reproduction rights was at first denied by the Supreme Court and then only granted by Congress with important restrictions as to the extent of this monopoly . . . by the addition of a provision for compulsory licenses and a maximum royalty").

The Tribunal's decision to set a compulsory license fee at an essentially monopoly price therefore violates the Act and is inconsistent with numerous decisions of this and other courts.

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[10] Indeed, Congress has specifically directed the Tribunal to set the jukebox compulsory license fee at a rate which, among other things, will "maximize the availability of creative works to the public." 17 U.S.C. § 801(b)(1)(A). The strong public policy against monopolies rests, of course, not on the mere fact that monopolies lead to higher prices, but on the fact that higher prices artificially restrict consumption of goods by the public. *See* R. Posner, *Economic Analysis of Law* 201 (2d ed. 1977).

II. The Tribunal Violated The Act And General Legal Principles By Refusing To Consider The Financial Condition Of Copyright Owners, And The Costs Incurred By Them, In Ascertaining What Would Constitute A Fair Return Under The Act.

The Act specifically provides that the Tribunal must set jukebox royalty fees at a level that will, among other things, "afford the copyright owner a fair return for his creative work." 17 U.S.C. § 801(b)(1)(B). The Act also requires that the fee reflect "the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to . . . capital investment, costs, [and] risk". 17 U.S.C. § 801(b)(1)(C).[11] As AMOA repeatedly asserted, in both the Tribunal and the court of appeals (App. C, *infra*, 48a; App. A, *infra*, 29a-30a), these determinations logically require the making of some inquiry into the costs incurred by copyright owners in connection with the production or purchase of copyrighted material. In setting the fees at issue here, however, the Tribunal eschewed consideration of any cost data whatsoever,[12] choosing instead to rely only

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[11] The Act also requires that the fee be calculated "[t]o maximize the availability of creative works to the public" (17 U.S.C. § 801(b)(1)(A)), "[t]o afford the . . . copyright user a fair income under existing economic conditions" (*id.* at § 801(b)(1)(B)), and "[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices" (*id.* at § 801(b)(1)(D)).

[12] The Tribunal repeatedly declined (*see* App. A, *infra*, 8a, 29a; AMOA C.A. Br. at 53-54) to allow AMOA to present evidence concerning the costs incurred by copyright owners or their overall economic condition, preferring instead to consider only the so-called "marketplace analogies." Indeed, the Tribunal was so convinced

(footnote continued)

upon "marketplace parallels" which, as we have shown (*see* pages 10-14, *supra*), are simply instances of monopoly pricing. The court of appeals approved the Tribunal's departure from its clear statutory mandate, recognizing that "the Tribunal relied on . . . general marketplace analogies not related to cost." App. A, *infra*, 8a.

By definition, a monopoly price far exceeds cost. *See* R. Posner, *Economic Analysis of Law* 282 (2d ed. 1977) ("[J]ust as the natural monopolist may, if unregulated, charge a price well above his average costs, so too may the copyright monopolist"). By looking solely to monopoly price analogies, the Tribunal failed even to consider, let alone estimate, what amount would constitute a "fair return" to the copyright owners. Instead, the Tribunal incorrectly assumed that "analogous" monopoly prices (set in the context of full copyright protection) are conclusive

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(footnote continued)
that these "analogous" monopoly prices afforded a sufficient measure of "fair return" that it refused to consider any information concerning the distribution practices of the performing rights societies that actually receive the royalties. The court of appeals approved the Tribunal's approach (App. A, *infra*, 29a): "In the proceedings before the Tribunal, the AMOA vigorously sought to bring into issue the manner in which the performing rights organizations distributed jukebox royalties to their affiliates and members. . . . [W]e believe that the inquiries sought by AMOA . . . are irrelevant to the purposes of the Act and that the Tribunal acted properly in denying these requests."

Although Congress plainly contemplated that the performing rights societies would play a substantial role in the distribution of royalties, neither the Act nor its legislative history contains any hint that Congress intended to subsidize such enterprises at the expense of copyright users. The Act mandates that the copyright owners—not the performing rights societies—shall receive a "fair return." The Tribunal's failure to consider such evidence reduces its finding of "fair return" to a matter of pure conjecture.

as to what constitutes a "fair return" to copyright owners. The Tribunal simply disregarded its statutory mandate and the court of appeals approved that lawless act.[13]

Not only does the decision below disregard the requirements of the Act, but it also conflicts in principle with the decision of the District of Columbia Circuit in *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (1981). In *Recording Industry*, the court affirmed that portion of a Tribunal rule that established a new compulsory license fee for the mechanical reproduction of copyrighted works. Although the court of appeals there noted that the "setting of [such] royalty rate[s] is not a routine exercise in historical cost of service ratemaking," and that "a broader inquiry" is required to determine the "fairness" of the return to the copyright owner (662 F.2d at 8-9), the court emphasized that the Tribunal properly "analyzed the empirical evidence in

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[13] The court of appeals' reliance (App. A, *infra*, 8a, 30a) upon this Court's decision in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), for the proposition that a "fair return" may reasonably be established without any estimate of copyright owners' costs, is misplaced. Indeed, *Permian Basin*, a complicated natural-gas rate-setting case, supports the view that costs must be carefully considered in fixing a fair return. In *Permian Basin*, this Court merely allowed those costs to be estimated by using "composite cost data intended to evidence the national costs . . . of finding and producing gas-well gas" rather than insisting upon calculation of the actual costs of discovery and production of the gas in the geographical area that was the subject of the ratemaking proceeding. 390 U.S. at 800. Far from holding that costs may be ignored—and that mon[illegible]y-set "marketplace analogies" may be substituted as the sole proxy for "fair return"—*Permian Basin* holds that costs are critical to "fair return" ratemaking, but may be estimated when accurate data is clearly difficult or impossible to obtain.

relation to the statutory criteria" (*id.* at 10). Unlike the evidence here, the record evidence in *Recording Industry* included substantial empirical studies of the economic costs and well-being of copyright owners.[14]

Indeed, the Tribunal's refusal in this case even to approximate a rough surrogate for the costs incurred by copyright owners conflicts with numerous decisions that have repeatedly emphasized the importance of costs in "fair return" ratemaking. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968).[15] The Tribunal's de-

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[14] Among other things, the Tribunal noted two sets of statistics which indicated that copyright owners were not receiving a fair return on their costs. *See* 662 F.2d at 11 n.25. First, the Tribunal found that royalties paid to copyright owners had fallen drastically from slightly more than those paid to recording artists in 1955, to barely one-fourth of those paid to recording artists in 1979. 46 Fed. Reg. 10485 (1981). Second, although recording artists' royalties had increased to 16.8 percent of wholesale record prices in 1974, copyright owners' royalty payments had declined from 11.2 percent of wholesale record prices in 1964 to 7.27 percent in 1974. *Id.* at 10476, 10481.

[15] *See also Interstate Commerce Commission* v. *New York, New Haven and Hartford Railroad*, 372 U.S. 744, 747 n.5 (1963) (railroad rate setting: "Fully distributed costs based on the out-of-pocket costs plus a . . . distribution of the constant costs . . . indicate the revenue necessary to a fair return on the traffic, disregarding ability to pay."); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 298 n.6 (1963) (natural gas rate setting: "The phrase 'jurisdictional cost of service' as used here means the producer's system-wide cost of service (*i.e.*, all operating expenses . . . *plus* a fair return on the rate base) for its sales of natural gas subject to the Commission's jurisdiction."); *Tenneco Oil Co.* v. *Federal Energy Regulatory Commission*, 571 F.2d 834, 840 (5th Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (natural gas rate setting:

(footnote continued)

termination, that the "fair return to copyright owners" requirement of the Act is necessarily satisfied by the award of de facto monopoly returns, without any inquiry into the collective costs or financial condition of copyright owners, is contrary both to the statute and to the case law.

III. The Tribunal Violated The Act And General Principles Of Administrative Law By Establishing Automatic Interim Rate Adjustments For The Periods Between Ratemaking Proceedings.

The Tribunal determined, without any statutory basis, that it was authorized to establish automatic—but not yet fully quantified—interim rate adjustments to become effective during the ten-year intervals between statutorily authorized ratemaking proceedings. *See* 17 U.S.C. § 804 (a).

Because the Act mandates not only that the Tribunal base fee adjustments upon explicit statutory criteria (17 U.S.C. § 801(b)(1)), but also that fees be re-examined only at ten-year intervals (17 U.S.C. § 804(a)), the Act plainly

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(footnote continued)

"The producers, under the Constitution as well as the Act, are, at bottom, only entitled to a fair return on their actual costs . . . ."); *Consolidated Rail Corporation* v. *United States*, 619 F.2d 988, 991 (3d Cir. 1980) (freight car rate setting; court holds that ICC used improper measure of cost when calculating "a fair return on the cost of owning and maintaining each type of freight car."); *Celanese Chemical Co.* v. *United States*, 632 F.2d 568, 571 n.4 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981) (coal transportation rate setting: "[T]he word 'costs' . . . include[s] all variable and constant costs plus a fair return on capital and an amount needed to attract additional capital.").

proscribes automatic interim fee adjustments such as those imposed here.[16] Similarly, it is beyond dispute that Congress intended that all fee increases be specially tailored to the unique conditions of the particular industries involved, not to general fluctuations in the broad-based Consumer Price Index. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 173 (1976) ("[I]t is therefore expected that any adjustment of a rate . . . shall be based on the economic conditions peculiar to the industries affected by that rate."). By definition, automatic fee adjustments are based not upon pre-adjustment review of specific industry conditions in light of specific statutory criteria, but upon mere, generalized predictions that the fee might not satisfy the statutory criteria in the future. The Act requires that adjustments be based upon findings, not predic-

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[16] The legislative history clearly shows that Congress envisioned *periodic*, rather than *continuous*, adjustments of compulsory license fees: "Chapter 8 establishes a Copyright Royalty Commission for the purpose of *periodically* reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licenses . . . ." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 173 (1976) (emphasis added). Congress made clear not only that it was not concerned that a fee might be stable over long periods of time, but that it actually intended that result where appropriate (*ibid.*): "The Committee does not intend these rate changes, whether up or down, should necessarily be made as the result of such periodic review." Moreover, congressional debate on the Act was focused not on the details of the periodic adjustment of compulsory license fees, but on the question whether there should be *any* periodic review of such fees and, if so, at what intervals. *See* AMOA C.A. Br. at 61-64 (description of legislative history).

tions, that an existing fee no longer satisfies the statutory criteria.[17]

Indeed, the Tribunal itself has recognized the impropriety of interim inflation adjustments in an analogous context. In the subsection immediately following that which establishes the criteria for adjusting jukebox royalty fees, the Act provides that one of the factors which the Tribunal may take into account in adjustment proceedings for cable television compulsory license fees—which may occur only every five years—is "national monetary inflation or deflation" (17 U.S.C. § 801(b)(2)(A)). Congress has made no such explicit provision for jukebox fees. *See* 17 U.S.C. § 801(b)(1).

Despite Congress,' specific expression of concern for the inflation-adjustment of cable television fees, however, the Tribunal recently rejected an industry proposal for interim inflation adjustment of such fees on the ground that the Act provides for review of these fees only once every five years. The Tribunal correctly stated that a "continuous adjustment mechanism would render this periodic review scheme meaningless" (46 Fed. Reg. 896 (1981)). Therefore, just as cable television rates (for which Congress explicitly expressed its inflation-adjustment concerns) cannot lawfully be subject to a "continuous adjustment mechanism" lest the Act's periodic review scheme be frustrated, *a fortiori* jukebox fees (for which Congress specifically expressed no such concern) cannot be subject to any interim inflation adjustment.

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[17] The Tribunal imposed two types of interim fee adjustments: (a) a phase-in mechanism, and (b) an inflation adjustment. The Tribunal ordered that its $50.00 rate be phased-in at $25.00 for 1982 and 1983, increased to the full $50.00 for 1984 through 1986, and then adjusted for inflation for 1987 through 1990. The procedure that the Tribunal followed here is, in this respect, simply inconsistent with its statutory mandate.

The Tribunal invoked a novel principle of administrative law to justify these interim jukebox fee adjustments: that the power of an administrative agency is not limited by its organic law, but extends to whatever Congress has not explicitly prohibited it from doing. Thus, the Tribunal stated (App. C, *infra*, 48a): "We find that there is nothing in the statute or legislative history which could be construed to limit the application of annual cost of living adjustments." The Seventh Circuit approved this concept of inherent agency authority (App. A, *infra*, 22a). Although the Tribunal and the court of appeals may have believed that the Act would be more effective if it provided for interim adjustments of jukebox royalty fees, the fact of the matter is that Congress made no such provision. By effectively rewriting the statute, the Tribunal has exceeded its statutory authority.

IV. This Case Raises Important Issues Which Should Be Decided By This Court.

As we have shown (*see* pages 10-22, *supra*), the court below declined review of the Tribunal's final jukebox rule despite the fact that the rule is inconsistent with both the Copyright Revision Act and general legal principles established by the decisions of this and other courts, and also with the way in which the Tribunal has construed the statute in analogous rulemaking proceedings. Not only has the Tribunal increased by at least 525% the statutory rate that Congress thought fair only four years ago, but, because of the peculiar structure of the Act, the Seventh Circuit's decision is now the law of the land and will remain so for at least ten years. Moreover, the rationale of the decision below will doubtless be relied upon in other Tribunal rulemaking proceedings.

Likewise, the ramifications of the Seventh Circuit's decision may extend well beyond the limits of the Copy-

right Revision Act. Because of the government's efforts at reducing unnecessary regulation, an increasing number of industries that were once fully regulated are now subject to only partial regulation. This case well demonstrates the effect of an administrative agency's reliance on statistics and indices generated by unregulated portions of an industry as a substitute for fulfilling its statutory mandate with respect to portions of the industry that Congress has chosen to regulate. Although such statistics may sometimes be relevant, they should never be deemed conclusive. *But cf.* Separate Findings of Facts, Conclusions and Opinion of Commissioner James, App. C, *infra*, 59a (emphasis in original) ("[I]t is clear that the marketplace guidelines of other analogous music users, provide the *only* credible evidence in the record to establish a 'reasonable' fee. Negotiated fees by analogous music users, which are identical or similar, based on this record is the only indicator of true market value."). The decision below ratifies the Tribunal's neglect of its statutory duty.

Also pregnant with pernicious implication is the reasoning that an administrative agency may do whatever Congress has not explicitly prohibited it from doing. That justification for administrative action is well wide of the mark because, by definition, administrative agencies possess only those powers that specifically have been delegated to them. They are bound to carry out—not create—basic government policy. Here, Congress was capable of granting copyright owners full monopoly protection instead of compulsory licensing rights, but chose not to do so. Likewise, Congress was capable of establishing an inflation accelerator for royalty fees, but again chose not to do so. The Tribunal exceeded not only the limits of its particular statutory mandate, but also the most fundamental principles of administrative law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 15, 1982

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2837

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,

Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,

Respondent,

BROADCAST MUSIC, INC.,

Party-Respondent.

No. 81-1324

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS,

Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,

Respondent.

No. 81-1482

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,

Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,

Respondent.

On Petition for Review of a Final Rule of the Copyright Royalty Tribunal

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ARGUED NOVEMBER 2, 1981—DECIDED APRIL 16, 1982

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge* and CAMPBELL, *Senior District Judge*.*

CUDAHY, *Circuit Judge*. On January 5, 1981, the Copyright Royalty Tribunal (the "Tribunal") published its final rule establishing the royalty fee payable by jukebox operators for the public performance of copyrighted nondramatic musical works. 46 Fed. Reg. 884 (1981); *see* 37 C.F.R. §§ 306.1-306.4 (1981). Various participants in these consolidated cases now seek judicial review of the Tribunal's rule, claiming *inter alia* that the fee established by the rule is either too high or too low and thus is not supported by the record or is arbitrary and capricious and violates the statutory requirement of reasonableness. After examining the voluminous record and briefs in this case, we find that the Tribunal's final rule is lawful in all respects. Accordingly, we deny the petition for review.

I. FACTS

A. *Statutory Framework*

The proceedings which are the subject of this appeal arise under the Copyright Revision Act of 1976 (the "Act"), 17 U.S.C. §§ 101-810 (Supp. I 1977). Under the Act, songs and tunes ("nondramatic musical works") may be copyrighted, but the exclusive rights associated with a copyright under section 106 of the Act are subject to the potential unilateral exploitation device known as the "compulsory license." *See* 17 U.S.C. §§ 115, 116(b) (Supp. I 1977). Most phonorecords are purchased for private use; they do not require any special licensing for this private use. However, the operators of "coin-operated phonorecord players," or jukeboxes, must secure a compulsory

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

license for the public performance of phonorecords purchased for use in these jukeboxes. By statutory exemption, jukebox operators were for many decades not required to directly compensate the owners of the copyrighted music for the commercial performance of such music. *See* 17 U.S.C. § 1(e) (1976) (repealed). Congress eliminated this exemption applicable to phonorecords played on jukeboxes when it passed the new Act and developed a method to provide compensation from the operators of jukeboxes to the owners of the copyrighted music utilized by the operators.

Section 116 of the Act requires jukebox operators seeking compulsory licenses to file an application with the Register of Copyrights enumerating the number and location of their jukeboxes "and [to] deposit . . . a royalty fee for the current calendar year of $8.00 for [each] phonorecord player." 17 U.S.C. § 116(b)(1) (Supp. I 1977). These fees are then distributed to copyright owners (after the deduction of administrative expenses (pursuant to section 116(c). The $8.00 fee was the first jukebox royalty provision in this country. The fee level, coming after an absence of any fee requirement for almost seventy years, "represents a compromise figure adopted in 1967 and, as a compromise, it is acceptable as the rate to be specified in section 116. . . . [The House Judiciary] Committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, 115 (1976).

The Act also provided for the establishment of the Tribunal as the administrative agency "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in section[] . . . 116." 17 U.S.C. § 801(b)(1) (Supp. I 1977). As a procedure for the determination of reasonable royalty rates, section

801(b)(1) of the Act directed the Tribunal to establish a rate that best achieves several specified objectives.[1] Pursuant to a timetable set out in the Act, *see* 17 U.S.C. § 804 (Supp. I 1977), the Tribunal was directed to commence proceedings in January, 1980, to determine whether an adjustment of the jukebox royalty fee established in 1976 by Congress in connection with the compulsory licensing ($8 per year per box) was warranted under the criteria of section 801(b)(1). The Tribunal's final decision was due by the end of 1980. 17 U.S.C. § 804(e) (Supp. I 1977). After that date, the final decision might be changed only in new rulemaking proceedings initiated by petition of a person with a "significant interest." This option to undertake a new rulemaking is available "in 1990 and in each subsequent tenth calendar year thereafter." 17 U.S.C. §§ 804(a)(2) and (a)(2)(c) (Supp. I 1977).

B. *Tribunal Proceedings*

Four organizations responded to the Tribunal's Federal Register notice commencing the jukebox royalty pro-

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[1] These objectives are:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. §§ 801(b)(1)(A)-(D) (Supp. I 1977).

ceedings. *See* 45 Fed. Reg. 62 (1980). Copyright owners were represented by the three principal performing rights societies: American Society of Authors, Composers and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc. The jukebox industry was represented by the Amusement and Music Operators Association (AMOA). The Tribunal conducted seven days of hearings and reviewed numerous economic studies and other exhibits. After these proceedings, the Tribunal considered proposed findings and conclusions submitted by ASCAP, BMI and AMOA. On December 10, 1980, the Tribunal adopted its decision at a public session and on January 5, 1981, the Tribunal's final rule was published together with its statement detailing "the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts it found relevant to its determination in that proceeding, and the specific reasons for its determination." 17 U.S.C. § 803(b) (Supp. I 1977); *see* 46 Fed. Reg. 884-91 (1981).

The Tribunal ruled upon a number of legal contentions that were raised during the proceedings, the most significant of which concerned the "burden of proof," the structure of rates allowed by the Act and the necessity for calculating rates of return. AMOA contended that the burden of proof to justify any increase above the $8.00 fee set by Congress rested on the copyright owners. The Tribunal rejected this contention, reasoning that since the statute *required* an initial determination of the reasonableness of the $8.00 fee during 1980 (without the need of an initial petition) and then permitted new determinations once every decade only upon the petition of interested parties, Congress could not have intended to make the copyright owners "petitioners" shouldering the burden of proof in the initial proceedings. In effect, the

Tribunal found that *none* of the parties had the burden of proof in the initial mandatory proceeding.

AMOA also argued that the Tribunal lacked the statutory authority to create a rate structure that would allow the Tribunal to automatically adjust the fee during the term of a proposed rate[2] to reflect deterioration of the fee's real value due to inflation. In support of this argument, AMOA noted that the statutory provisions related to the jukebox compulsory license (sections 116 and 804) employed only the term "rates" when outlining the Tribunal's authority rather than the phrase "terms and rates," which is found in the provision applicable to public broadcasting. *See* 17 U.S.C. § 118(b) (Supp. I 1977). The Tribunal rejected AMOA's argument. Holding that the word "terms" was employed in the public broadcast provision to insure that the Tribunal could control such ancillary matters as payment methods, the Tribunal concluded that nothing in the Act or its legislative history could be construed to proscribe the application of annual cost of living adjustments to the jukebox royalty fee.

Finally, the Tribunal also rejected AMOA's argument that, when establishing a royalty fee, the Act required the Tribunal to calculate individual compensation or returns to individual copyright owners from their ownership of copyrighted music rather than permitting reliance on a collective rate of return applicable to the copyright owners as a group. The Tribunal found that the legislative history of the Act evinced no intent that

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[2] As noted above, the Act allows a party with a "significant interest" in the jukebox royalty fee to petition for an adjustment of the royalty fee beginning in 1990 "and in each subsequent tenth calendar year thereafter." 17 U.S.C. §§ 804(a)(1) & (a)(1)(C) (Supp. I 1977). Thus the "term" of a rate adopted by the Tribunal is presumably to be ten years.

the Tribunal regulate the internal operations of the performing rights societies. The Tribunal's authority was strictly limited to setting applicable royalty fees and establishing the distribution to claimants. The Act in section 116(c)(4)(B) specifically provides that royalty fees are to be distributed to the performing arts organizations.

The Tribunal determined in its order of January 5, 1981, that the royalties payable by jukebox operators to the owners of copyrighted music should be set at a level of $50.00 per jukebox per year. Purportedly recognizing its obligation to balance fairness to copyright owners with its duty to avoid disruption of the jukebox industry, *see* note 1 *supra*, the Tribunal provided for the implementation of the $50.00 per year fee in two stages. The Tribunal ordered jukebox operators to pay only $25.00 per jukebox in 1982 and 1983; thereafter, the operators would be liable for the full $50.00 fee. Finally, the Tribunal also determined to subject the royalty fee to a cost-of-living adjustment in 1987.

The Tribunal apparently reached its conclusions as to the level of royalty fees by relying primarily on marketplace analogies. According to the Tribunal, certain "marketplace parallels" could serve as appropriate benchmarks to be weighed together with the entire record and the statutory criteria in arriving at a fair royalty fee. This marketplace approach is, of course, essentially a method of attempting to establish a parity between regulated royalty fees to be paid by jukebox operators for the use of copyrighted works and fees charged for comparable rights in a regime of competition (sometimes affected by direct government regulation).

In adopting the marketplace analogy approach, the Tribunal rejected AMOA's contention that it should establish the value of individual musical works based on

the time and expense incurred by songwriters in producing each work, together with a value derived from the placement of a work on a popularity chart. AMOA's approach, which apparently seeks to base the fee in part upon the cost to the copyright owner, would arguably meet one of the four objectives set forth in section 801, *i.e.*, the provision of a fair return to the copyright owner for the use of his work. The Tribunal's decision to reject this kind of individualized cost-based approach is analogous in some respects to certain decisions of the Federal Power Commission (FPC) applying the Natural Gas Act of 1938 to the wellhead price of natural gas. Just as the FPC abandoned as impracticable its effort to set a reasonable natural gas price for each independent natural gas producer based on costs peculiarly assignable to that producer, the Tribunal here declined to set an appropriate rate based on cost-related factors involved in the production of each copyrighted work. Instead the Tribunal relied on more general marketplace analogies not related to cost. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 754-70 (1968).[8] Thus, the Tribunal attempted to set a uniform rate applicable to all jukeboxes and payable on an annual basis. The fee was payable without regard to the amount of copyrighted material used or the revenues generated for the jukebox operator by the use of the copyrighted material.

The Tribunal provided a detailed analysis of its final rule in relation to the four statutory criteria set out in section 801. The Tribunal did not find the first statutory

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[8] We recognize that maximum area rates for natural gas, which were approved in the *Permian Basin* decision, purport to be based upon *composite costs* for the area in question. The royalty fees set by the Tribunal, to the extent they reflect "marketplace analogies," are based upon *value* comparisons with arguably comparable fees.

objective of maximizing "the availability of creative works to the public" to be a crucial factor in this case because the "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers." 46 Fed. Reg. 889 (1981). The second criterion—affording a fair return to the owner and a fair income to the user—was satisfied in major part, according to the Tribunal, by the use of marketplace analogies, modified by the phasing-in of the fee schedule and by adjusting the fee for future inflation. With respect to the third criterion, the Tribunal indicated *inter alia* that there was "no basis for concluding that jukebox operators and owners of establishments with jukeboxes make any unique or distinctive contribution concerning creativity, technology, capital investment, cost, risk and the opening of new markets for creative expression and media for their communication." 46 Fed. Reg. 889 (1981). Hence, the Tribunal found that the equities weighed in favor of higher remuneration to copyright owners. The fourth criterion emphasized the minimization of any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. As to this criterion, the Tribunal found that a failure to establish a reasonable fee for jukebox performances could interfere with the receipt by performing rights societies of reasonable fees from other users of copyrighted music by artificially depressing fees similar to those under examination. The Tribunal, however, recognized that its decision would also affect the jukebox industry because of the low profit margin earned by most jukebox operators. The Tribunal concluded that the phasing-in approach to fee increases which it adopted "adequately reflected" concern for the impact of the change on all parties involved.

II. STANDARD OF REVIEW

Our jurisdiction to review the Tribunal's decision is based on 17 U.S.C. § 810 (Supp. I 1977), which provides:

> Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register by an aggrieved party. The judicial review of the decision shall be had, in accordance with chapter 7 of title 5 [of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976)], on the basis of the record before the Tribunal. No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.

On this appeal, the Tribunal argues that the appropriate provision of the Administrative Procedure Act (APA) to apply with respect to judicial review here is 5 U.S.C. § 706(2)(A) (1976), which provides that a reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This, of course, is the standard of review generally provided by the APA for informal rulemaking. *See National Association of Food Chains, Inc.* v. *ICC*, 535 F.2d 1308, 1313-14 (D.C. Cir. 1976) (per curiam).

On the other hand, AMOA argues, on the basis of a number of factors including legislative history, that the intent of Congress was to subject the Tribunal's decisions to the "full scope" of judicial review provided by the APA.[4] We understand AMOA's argument to suggest the

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[4] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 179 (1976) (emphasis supplied), states:

> The Committee concluded that determinations of the Copyright Royalty Commission were not appropriate subjects for

(footnote continued)

applicability not only of 5 U.S.C. § 706(2)(A)—the "arbitrary and capricious" standard—but also the standard from 5 U.S.C. § 706(2)(E) which requires that the determinations of the Tribunal be supported by "substantial evidence." AMOA also apparently argues that review under either of these two standards in the instant case would produce the same result.

At least technically, the Tribunal correctly argues that the APA requires review under the "substantial evidence" standard only in cases "subject to sections 556 and 557 of the [APA] or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(E) (1976). Sections 556 and 557 set forth the requirements for, respectively, formal rulemaking and formal adjudications, under the APA. The Tribunal argues that these sections are not applicable here, however, because this proceeding is neither an APA-required formal rulemaking nor an APA-required adjudication. Further, the Tribunal's enabling legislation does not expressly require an "on the record . . . agency hearing." *See* 5 U.S.C. § 553(c) (1976). The Act refers only to Tribunal "proceedings," *see* 17 U.S.C. § 804 (Supp. I 1977), in contrast to "on the record . . . hearings," as specified in the APA's provision governing the applicability of the substantial evidence test. Thus, according to the Tribunal, it remains free to establish whatever procedures it deems necessary for its "proceedings."

The Tribunal by regulation has elected to adopt quite formal procedures in its royalty adjustment proceedings.

(footnote continued)

regular review by Congress and that the provisions of the Senate bill providing for judicial review were far too restrictive. Therefore, it amended the Senate bill to eliminate automatic Congressional review and to broaden the scope of judicial review. The amended bill provides for the *full scope* of judicial review provided by Chapter 7 of the Administrative Procedure Act.

See 37 C.F.R. §§ 301.40-301.56, 301.60-301.69 (1981).[5] But self-imposed formal proceedings not required by statute presumably do not call into play the substantial evidence standard of review. *See Automobile Club of New York, Inc.* v. *Cox*, 592 F.2d 658, 664 (2d Cir. 1979). In addition, the Tribunal in conducting royalty adjustment proceedings is presumably engaged in the approval of rates for the future and these activities therefore constitute rulemaking as defined by the APA. *See* 5 U.S.C. §§ 551(4), (5) (1976).

We believe that the standard of judicial review enunciated by the late Judge Leventhal in *American Public Gas Association* v. *FPC*, 567 F.2d 1016, 1028-29 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978), is appropriate to the instant proceeding. That standard requires us, *inter alia*, to analyze the record to determine that "there [is] support in the public record for what is done" and that the Tribunal " 'has given reasoned consideration to each of the pertinent factors [involved in the decision].' " *American Public Gas*, 567 F.2d at 1029 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968)).[6]

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[5] The Tribunal's regulations governing these "formal hearings," 37 C.F.R. § 301.41(a) (1981), which were followed in this case, provide for published notice of an impending hearing, oral presentation of witnesses and submission of evidence to the Tribunal complete with cross-examination and rebuttal, certification of an official transcript of the hearing, application of various evidentiary rules and principles set out in the regulations, and submission of proposed findings and conclusions to the Tribunal.

[6] We recognize of course that the *American Public Gas* case was decided under the Natural Gas Act of 1938, 15 U.S.C. § 717(b), which provides that the finding of the Commission as to the facts, *"if supported by substantial evidence,* shall be conclusive." The Copyright Revision Act of 1976 has no comparable provision.

American Public Gas involved essentially the second venture of the FPC in setting national wellhead rates for new natural gas applicable to producers operating under widely disparate conditions. Essentially, the agency in that case used a notice-and-comment rulemaking procedure. Although this procedure was certainly less rigorous than the one pursued by the Tribunal in the instant case, we think that the standard of judicial review employed by Judge Leventhal in *American Public Gas* is quite in point to the instant problem. The Tribunal in this case faced a task similar in some respects to the problem confronting the FPC in *American Public Gas*: it had to establish a national royalty fee applicable to widely disparate jukebox owners and operators where the fees will redound (through the performing rights societies) ultimately to the benefit of widely disparate copyright owners. In *American Public Gas*, Judge Leventhal noted, as the Tribunal argues here, that some commentators have interpreted the "substantial evidence" rule to require a more rigorous standard of review than the "arbitrary-capricious" standard. We agree with Judge Leventhal (who in turn agreed with Judge Friendly)[7] that the issue is largely semantic and that the two criteria "tend to converge" in notice-and-comment rulemaking. *American Public Gas*, 567 F.2d at 1029; *accord*

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[7] *See Associated Indus. of N.Y. State, Inc.* v. *United States Dept. of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973). Although *Associated Industries* involved informal (*i.e.*, notice-and-comment) rulemaking, we believe the principles articulated there by Judge Friendly are applicable to this case where formal procedures are used. Indeed, Judge Friendly astutely observed that the distinction between the "substantial evidence" and the "arbitrary and capricious" standard may matter only in administrative *adjudications* where an agency's decision may not be supported by substantial evidence but nonetheless could pass muster under an arguably less rigorous "arbitrary and capricious" standard.

K. Davis, Administrative Law of the Seventies § 29.00 (1976). *But cf. Camp* v. *Pitts*, 411 U.S. 138, 140-41 (1973) (per curiam) (court applied arbitrary and capricious standard rather than substantial evidence standard to review administrative adjudication).

Although we are not confronted here with notice-and-comment rulemaking, we believe that the two criteria do indeed tend to converge when applied to the Tribunal's fee determination. We also agree with Judge Leventhal that "[w]hat is basic is the requirement that there be support in the public record for what is done." *American Public Gas*, 567 F.2d at 1029; *accord Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); *City of Chicago* v. *FPC*, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). Moreover, in a closely analogous setting, the District of Columbia Circuit recently reviewed the royalty fee established by the Tribunal for the compulsory licensing of phonorecords pursuant to section 115 of the Act and concluded that the arbitrary and capricious standard was applicable. *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 7-8 (D.C. Cir. 1981).

Thus, we agree with the Tribunal that, upon a close reading of the APA, the most appropriate standard of review applicable to this record is the "arbitrary and capricious" standard. But we do not believe that application of this standard to the instant case will produce a significantly different result than attempting to determine whether there is substantial evidence in the record to support the Tribunal's findings. Thus, under either test we believe that the Tribunal's conclusions pass muster. Our essential conclusions in this case also rely in large measure on the legislative history of the Act, which bespeaks an intent to subject Tribunal determinations to the "full scope" of judicial review. *See* note 4 *supra*.

The standard-of-review analysis here is not unlike our analysis in *Illinois* v. *United States*, 668 F.2d 923 (7th Cir. 1981) (*"Mopac"*). In that case, we followed the earlier determination of a panel of this court in *Illinois* v. *United States*, 666 F.2d 1066 (7th Cir. 1981), in applying the "arbitrary and capricious" standard to rail line abandonment proceedings conducted by the Interstate Commerce Commission. The abandonment proceedings in *Mopac* were carried on pursuant to statutes that did not, as in the instant case, *require* public hearings. In addition, the complexity of both the issues and the factual evidence in *Mopac* necessitated a careful and searching analysis of the record by the reviewing court, notwithstanding any difference in theory in level of scrutiny demanded by the substantial evidence or by the arbitrary and capricious formulae, respectively. Under those circumstances, we noted in *Mopac* that the "distinction between [the arbitrary and capricious] standard and the substantial evidence test is without practical significance." 668 F.2d at 930. We believe that the instant case is quite comparable to *Mopac* not only because of the apparent absence of requirements for on-the-record heaings but also because the complexity of both cases requires a careful, "full-scope" review of the record, regardless of the particular reviewing standard employed. Thus, the "arbitrary and capricious" test in this particular situation prescribes a process of review not unlike that which would be pursued under the "substantial evidence" standard.

III. APPEAL OF THE AMUSEMENT AND MUSIC OPERATORS ASSOCIATION

The AMOA presented numerous witnesses and exhibits, including a survey conducted by the public accounting firm of Peat, Marwick, Mitchell and Company ("PMM & Co."), to demonstrate the depressed economic condition of the

jukebox operators' business. These witnesses provided such information as the number of jukebox operators, the number of jukeboxes in operation, the number of jukeboxes produced per year, the size of the typical jukebox operator's business and the prices charged per play. In general, the PMM & Co. survey revealed that the typical jukebox operator operated 77 jukeboxes and 225 amusement games. Jukeboxes and games are operated together in 65% of all jukebox locations, and approximately 65% of all jukeboxes are located in cities of 40,000 or less population. According to the AMOA's operator witnesses, jukeboxes usually provide two plays for a quarter or five plays for fifty cents, thus averaging about ten cents per play. The survey by PMM & Co. indicated that for the jukebox industry at large, 18% of the jukeboxes in operation earned for their operators less than $300.00 per year and that 47% of the jukeboxes earned less than $700.00 per year. PMM & Co.'s survey also purported to show that for smaller operators (*i.e.*, those operating fewer than 50 jukeboxes), 23% of their jukeboxes earned less than $300.00 per year and 56% earned less than $600.00 per year.

Other evidence demonstrated that during the forty year period from 1940 to 1980, the average price per play on jukeboxes had not increased at a rate commensurate with the inflation as measured by the Consumer Price Index (CPI). Additional evidence was introduced to show the general downward trend in the jukebox manufacturing business in the United States as demonstrated by a decline in units shipped during the 1970's. Finally, several jukebox operators testified that the continuing decline in the number of jukeboxes in operation was attributable both to the operators' inability to increase prices per play in line with inflation and to the loss of prime jukebox locations due to socio-economic changes, such as urban redevelop-

ment and the replacement of jukeboxes by other means of entertainment.

Citing this evidence of the decline in the jukebox operating business as demonstrated by decreasing revenues and margins of profit and the industry-wide reduction in numbers of locations and of jukeboxes in operation, AMOA argued before the Tribunal that the $8.00 royalty fee set by Congress when it passed the Act should be left unchanged. In addition, AMOA argued that the performing rights organizations bore the burden of establishing the necessity for an increase in the $8.00 licensing fee and that there was no statutory basis for the inflation adjustment ordered by the Tribunal to take effect on January 1, 1987. As previously indicated, the Tribunal found that the plain structure of the statute could not be reconciled with an approach which in effect would make the copyright owners "petitioners" in the initial mandatory proceeding and that an inflation adjustment during the effective term of a rate was not precluded by the Act.

Essentially, AMOA now argues on appeal that the $8.00 fee was selected by Congress for reasons other than reaching a temporary compromise, that any party seeking to change the $8.00 fee in the initial mandatory determination must bear the burden of proof supporting a change, and that the Tribunal erred by increasing the royalty fee when the evidence demonstrated that an increased fee may cause some jukeboxs to become unprofitable. We believe that the legislative history of the Act clearly refutes these contentions. The reports of both the Senate and the House Judiciary Committees,[8] which took basically similar approaches and used similar language, demonstrate that the basis of AMOA's argument is incorrect. After discussing the prin-

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[8] *See* S. Rep. No. 473, 94th Cong., 1st Sess. 95-99 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 111-15, 173-79, 347-49 (1976).

cipal contentions for and against eliminating the fee exemption of the jukebox industry under the previous copyright statutes, the House Judiciary Committee concluded:

> 1. The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption.
>
> 2. Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption.
>
> 3. The most appropriate basis for the compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Commission.
>
> 4. The $8 per box annual compulsory license fee *represents a compromise figure* adopted in 1967 and, as a compromise, it is acceptable as the rate to be specified in section 116. The Committee was impressed by the testimony offered to show that shifting patterns in social activity and public taste, combined with increased manufacturing and servicing costs, have made many juke box operations unprofitable.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113 (1976) (emphasis supplied).

The Senate Judiciary Committee Report reiterated verbatim the first three paragraphs of the House Report and slightly modified the final paragraph as follows:

> 4. This committee in 1958 recommended an average annual per box payment of $19.70. The

> most recent hearings on the jukebox question did not provide any indication that the committee's decision in 1958 was unwise or the rate of payment unreasonable. In providing in this legislation for a total payment of $8 per box the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, *the committee has endeavored to facilitate the progress of this legislation by preserving,* to the extent possible in view of other provisions of this bill, *the rate adopted by the House of Representatives.*

S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975) (emphasis supplied). Although the House Judiciary Committee seemed more concerned with the economic plight of the jukebox industry, both reports strongly suggest that the $8.00 fee was a political compromise. Certainly there is nothing in the reports to suggest that the $8.00 fee represents a finding by Congress of a reasonable fee for the 1980's.

The procedures established by the Act for determining and implementing the royalty fee underscore this conclusion. Section 804(a) of the Act directs the Tribunal to institute proceedings to adjust the jukebox fees set in section 116 in order to determine a reasonable fee under the criteria of section 801(b)(1). Subsequent to the initial establishment of a reasonable fee, the Tribunal is directed by section 804(a)(2)(C) to conduct proceedings for further adjustments in 1990 only upon the petition of a copyright owner or user with a significant interest. Since the relevant congressional committees have expressly disavowed any notion that the $8.00 fee was either reasonable or "calculated to achieve" the goals of section 801(b) and because Congress directed the Tribunal to conduct initial proceedings determining the reasonableness of the $8.00 fee in 1980, we think the Tribunal correctly concluded that

no special legislative imprimatur is attached to the $8.00 fee.

We also reject AMOA's argument that section 803(a) of the Act, in conjunction with section 556(d) of the APA, 5 U.S.C. § 556(d) (1976), places a burden of proof on copyright owners to justify an increase in the $8.00 royalty fee. Section 803(a) of the Act declares that "chapter 5, subchapter II and chapter 7" of the APA apply to Tribunal proceedings. It is far from clear whether this provision incorporated by reference APA section 556(d), which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Section 556 presumably does not apply if, as here, there appears to be no requirement in the Act for formal hearings. *See* 5 U.S.C. §§ 553(c), 556(a) (1976). But in any event, the requirement of section 556(d) that "the proponent[s] of a rule or order [have] the burden of proof" is coupled with the phrase "[e]xcept as *otherwise* provided by statute." 5 U.S.C. § 556(d) (1976) (emphasis supplied). In the instant case, we believe that the statute provides "otherwise." The statutory scheme which directs the Tribunal to hold initial ratemaking proceedings makes it quite clear that the copyright owners in this case are no more the "proponent[s] of the rule" than is AMOA. ASCAP, for example, is under no greater or lesser burden to prove the propriety of its $70.00 royalty fee proposal than is AMOA to prove the validity of its proposed $8.00 fee.

Moreover, AMOA has failed to demonstrate in this case that the Tribunal acted arbitrarily and capriciously or without support in substantial evidence when it rejected the proposed $8.00 fee. The centerpiece of the AMOA's evidence was the survey conducted by PMM & Co. The survey purported to show that 18% of all jukeboxes in

operation earned for their operators less than $300.00 per year and that 57% earned less than $600.00 per year. The survey also suggested that the operators' average annual revenue per jukebox was $754.00 while their average annual operating cost per jukebox was $673.00, thus producing a statistically calculated average gross profit per jukebox of $88.00 annually. These survey statistics indicate that many jukeboxes, especially those of operators with fewer than 50 boxes, are operated at a loss or at no significant profit, and that any increase in the jukebox royalty rate would probably force some small operators out of business.

We agree with the Tribunal, however, that the conclusions of this survey should be accorded little weight. The questionnaire distributed in connection with the survey generated a low response rate from the jukebox operators, estimated by PMM & Co. at approximately 14%. Dr. John Scarbrough, the PMM & Co. manager in charge of the survey testified, "I wouldn't argue very hard if you wanted to say that it was not a good response." 46 Fed. Reg. 888 (1981). If substantial weight is not accorded to the survey, AMOA is left with relatively anecdotal evidence concerning the marginal profitability of some jukeboxes and some jukebox operations.

Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase. But to accept the proposition that AMOA may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable is, we believe, unsound and unjust. The Tribunal found that "this testimony [anecdotal testimony of selected jukebox operators and other industry witnesses] does not provide a basis for forming any representative picture of

the jukebox industry nor does it create a foundation for the industry's claim of economic hardship." 46 Fed. Reg. 888 (1981). We believe that the action of the Tribunal in making this finding is not "arbitrary and capricious."

Finally, AMOA challenges the validity of the Tribunal's decision to phase in the royalty rate increase and to allow an inflation adjustment in 1987. We believe that both the phase-in mechanism and the inflation adjustment, which cut in opposite directions, merely demonstrate a flexibility with which Congress intended to endow the Tribunal in making its determinations. Although section 801(b)(1) directs the Tribunal to make a determination of a reasonable fee, the language Congress actually selected to describe this duty specifically directs the Tribunal "to make determinations concerning the adjustment of reasonable copyright royalty rates." 17 U.S.C. § 801(a)(1) (Supp. I 1977) (emphasis supplied). There is nothing in this language to preclude a reasonable royalty from including a device to ease the disruption attendant upon a new fee substantially departing from the current level; in fact, section 801(b)(1)(D) imposes the contrary requirement. *See* note 1 *supra*. Similarly, a cost of living or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act.[9]

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[9] Our approval of an automatic inflation adjustment in 1987 does not conflict with the recent decision in *Recording Indus. Ass'n of Amer.* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 14-18 (D.C. Cir. 1981) (*RIAA*), where the court rejected that portion of the Tribunal's rule which would have allowed the Tribunal to adjust the royalty rate payable for phonorecord manufacture and distribution. The apparently unlawful aspect of the inflation adjustment procedure adopted by the Tribunal in *RIAA* was that the adjustment was not automatic or tied to an independent indicator (such as the CPI) but instead allowed the Tribunal to recalculate every

(footnote continued)

In fact, the phase-in mechanism which AMOA attacks is supported by that part of the record generated by AMOA to reflect the fears of its witnesses with respect to the impact of the new fee. We do not believe that the objection by AMOA to the CPI as an appropriate measure of changing values of the royalty fee as measured in nominal dollars should be accorded much weight. Other adjustment mechanisms, such as the Gross National Product Price Deflator, *see* 15 U.S.C. § 3311(a) (Supp. III 1979), are perhaps available, but the CPI (even though it measures a typical *cost of living* change) is broadly used as an appropriate reflection of inflation, and we think its use in the present context is not arbitrary or capricious and is adequately supported by substantial evidence.

IV. THE ASCAP/SESAC CASE

ASCAP and SESAC jointly presented arguments and evidence to the Tribunal relying on so-called marketplace analogies as the basis for their claim that the royalty fee should be increased above the $8.00 rate. Dr. Paul Fagan, an ASCAP witness, testified about three marketplace

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(footnote continued)

year at its discretion the royalty rate based on an average price of records. The *RIAA* court could find no basis in either the Act or its legislative history to permit the Tribunal to undertake each year such an unfettered continuing review of its allegedly final rule regarding the phonorecord royalty. On the other hand, the court noted that a lawful adjustment procedure could be established provided that it was automatic and fixed by formula and was thus beyond the exercise of the Tribunal's discretion. 662 F.2d at 17. The Tribunal's adjustment procedure in the instant case meets these objectives and therefore we believe that whatever applicability the anaylsis in *RIAA* (which, in fact, was limited to the phonorecord royalty and did not address the jukebox royalty question) may have here does not require rejection of the Tribunal's 1987 adjustment.

analogies—competitive models, so to speak—upon which the amount of a royalty fee could be based. The first such analogy was to the license fees paid to copyright owners by commercial establishments such as restaurants, taverns, bars and grills which use tape recorders, record players or jukeboxes not subject to compulsory license to play copyrighted music.[10] Dr. Fagan testified that the lowest such fee received by ASCAP alone for the right to play the copyrighted music of its members in these establishments was $70.00; the total minimum aggregate fee paid by such establishments to ASCAP, BMI and SESAC for the right to play a member's music was $190.00. If the compulsory license did not exist, ASCAP would charge at least $70.00 for the right to operate jukeboxes playing copyrighted music in these establishments. According to ASCAP, if all three repertories were licensed at once, under these circumstances, the resulting minimum license fee would be at least $140.00.

Dr. Fagan also testified as to license fees paid to the performing rights groups by the providers of background music services. The ASCAP fee alone for background music in establishments comparable to those where jukeboxes were used would be about $27.00 for each establishment. Adjusting this figure for inflation occurring since 1971, Dr. Fagan arrived at a fee of about $52.08 for 1980. The third analogy testified to by Dr. Fagan involved license fees paid by foreign jukebox operators to foreign performing rights groups where the fees were either negotiated with industry groups or were subject to governmental approval. Dr. Fagan found that the average fee

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[10] Indeed, the Act excludes jukebox performances in these establishments from the compulsory license provisions since they charge patrons (either directly or indirectly) for admission. *See* 17 U.S.C. § 116(e)(1)(B) (Supp. I 1977).

paid by jukebox operators in the nineteen countries surveyed by ASCAP was $95.33, and the mean was $70.92. He noted, moreover, that fees charged in the United States should be higher than those charged abroad because of the generally higher level of income in this country.

ASCAP and SESCA concluded that these marketplace analogies suggested a "zone of reasonableness"[11] for the royalty fee between $70.00 and $140.00. They recommended to the Tribunal that it set the fee at the low end of that zone (*i.e.*, $70.00), with an annual inflation adjustment. Dr. Fagan testified that the jukebox operators could afford a $70.00 fee since this would amount to a daily charge of only 19¢ per jukebox.

In general, the Tribunal found that the concept and methodology of the ASCAP/SESAC rate determination was "most attractive." The Tribunal conceded, however, that the marketplace analogies, individually and collectively, were subject to limitations and distinguishing features. AMOA contended, for example, that "mechanical"

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[11] ASCAP also argued, relying on the *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), that the scope of our review was limited to ascertaining whether the Tribunal's rate fell within this "zone of reasonableness." Although we are without authority to set aside a rate chosen by the Tribunal if it is within the "zone of reasonableness," the *Permian Basin* case did not hold, as ASCAP/SESAC seems to suggest, that the "zone" is defined solely by the evidence produced by a party at the hearing. Rather, the zone referred to in *Permian Basin* is the zone defined by the statutory criteria governing the ratemaking. *See Permian Basin*, 390 U.S. at 767; *Recording Indust. Ass'n of Amer.* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C. Cir. 1981). For the reasons set out in this opinion, we believe the Tribunal lawfully adopted a rate that falls within the zone defined by the criteria of section 801(b)(1) even though it may not fall strictly within the alleged "zone" established by the ASCAP/SESAC evidence.

and "background" music lack the basic element of customer selection which is a distinguishing feature of jukebox-furnished music. AMOA also argued that jukebox license fees reportedly paid in foreign countries lack comparability because of the many differences among the foreign countries surveyed. Conversion of foreign fees into United States equivalents, as proposed by an ASCAP witness, is too simplistic a procedure to provide credible comparisons for domestic purposes. Perhaps more fundamentally, AMOA asserted that the "marketplace" analogies were generally inappropriate because the allegedly analagous fees in each situation were established under the protection of government-granted monopoly rights (which exist presumably in the form of copyright protection) rather than in a free competitive market. AMOA also objected to these comparisons because the type of performances in question lack comparability to performances of music on jukeboxes.

We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices. *See, e.g., San Antonio* v. *United States*, 631 F.2d 831, 836-37 (D.C. Cir. 1980), *clarified*, 655 F.2d 1341 (D.C. Cir. 1981); *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 641-43 (8th Cir. 1977). Moreover, we believe that ASCAP/SESAC presented the most credi-

ble and relevant evidence before the Tribunal. The arguably analogous musical fees provide substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark.

In its decision, the Tribunal acknowledged that the rate which it approved could not be directly linked to marketplace parallels, but it found that such parallels served as appropriate points of reference to be weighed together with the entire record and the statutory criteria. Although we agree with ASCAP that the analogous marketplace evidence is significant, we do not believe that the Tribunal was bound by that evidence to select a fee rate within the $70.00-$140.00 "zone" which, according to ASCAP, governs this case. The Tribunal carefully weighed the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arrived at a royalty rate for coin-operated phonorecord players of $50.00 per machine. In recognition particularly of the fourth statutory criterion, which counseled minimization of the disruptive impact on the industries involved, the Tribunal ordered the $50.00 rate to go into effect on a phased-in basis. Indeed, the Tribunal could not ignore this statutory directive to consider industry disruption—a factor which the marketplace evidence, standing alone, does not address. Moreover, AMOA accurately points out that certain characteristics of jukebox music such as direct customer selection and a direct customer charge for the music, are not found in the forms of music relied on for the marketplace analogies. Thus, we believe that the Tribunal's reliance on the ASCAP/SESAC evidence *together* with the statutory criteria and the entire record in arriving at the $50.00 fee is not arbitrary and capricious and is fully supported by substantial evidence on the record as a whole.

V. THE BMI CASE

The evidence and arguments presented to the Tribunal by BMI were relatively simple. BMI proposed that the Tribunal determine the fee by applying the Consumer Price Index to a proposed jukebox royalty rate of $19.70, first referred to in a 1958 Senate committee report recommending repeal of the jukebox royalty exemption. *See* S. Rep. No. 2414, 85th Cong., 2d Sess. 12 (1958). In this report the Senate committee apparently reached the conclusion that a proposed differential rate arrangement would produce an average per annum royalty of $19.70 per jukebox. In 1966, a House committee conducted an economic study in connection with another bill attempting to impose a performance fee on jukebox operators, concluding that a fair average rate would be $19.20—a rate which the BMI argues is very comparable to $19.70. *See* H. R. Rep. No. 2237, 89th Cong., 2d Sess. 112 (1966). The $19.20 figure was again noted favorably by the House Judiciary Committee in 1967. *See* H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967).[12] BMI argues that the legislatively approved rate should be adjusted for changes through 1980 in the price level from the date when, BMI contends, Congress gave its most recent recognition to the reasonableness of the $19.70 figure (*i.e.*, 1975). *See* S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975); *Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 426 (1975) (statement by Rep. Kastenmeier). This adjustment results in a rec-

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[12] However, after further consideration of the 1967 legislation, the Senate recommended a fee rate of $8.00 as part of a political compromise. *See Second Supplementary Report of Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill* ch. X (1975). *See generally* S. Rep. No. 473, 94th Cong., 1st Sess. 96-97, 99 (1975).

ommended fee of $30.00 which, if adopted, would then be adjusted annually for inflation.

We believe that this approach based upon previous legislative references to various royalty rates contained in bills which Congress did not enact does not accord with the mandate of the Act that the Tribunal perform an independent analysis based upon evidence to arrive at a fair and reasonable fee. Congress would not have provided ratemaking procedure and criteria of fairness if it merely expected the Tribunal to derive a royalty rate from legislative history. Hence, we believe that the Tribunal correctly found "that [BMI's] approach is not in accord with our statutory responsibilities in this proceeding." 46 Fed. Reg. 888 (1981).

VI. PERFORMING RIGHTS SOCIETIES' FINANCIAL DATA

In the proceedings before the Tribunal, the AMOA vigorously sought to bring into issue the manner in which the performing rights organizations distributed jukebox royalties to their affiliates and members. AMOA argued that the Tribunal was required by section 801(b)(1)(B) of the Act to investigate the distribution methods of the performing rights organizations. We find that these arguments are conclusively answered in section 116(c)(4)(B) of the Act which specifically provides that royalty fees are to be distributed to the performing rights organizations:

> (4) The fees to be distributed shall be divided as follows:
>
> * * * * * *
>
> (B) to the performing rights societies, the remainder of the fees [not distributed directly pro rata to copyright owners] in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

17 U.S.C. § 116(c)(4)(B) (Supp. I 1977). This language of the Act evinces Congress' recognition of the collective nature of the ratemaking process in these circumstances. As already indicated, we believe it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her "investment" in copyrighted material. *See Permian Basin Area Rate Cases*, 390 U.S. at 805-13. Therefore, we believe that the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act and that the Tribunal acted properly in denying these requests.

VII. TRIBUNAL'S ACCEPTANCE OF BMI LETTER WITHOUT SERVICE ON OTHER PARTIES

AMOA objected to the submission by BMI counsel of a letter dated May 12, 1980, addressed to the Tribunal with an enclosure listing "background" music rates that BMI asserted it charged its licensees. Unbeknownst to the Tribunal, this letter and enclosure were not served upon the other parties, and the Tribunal was not cognizant of that omission until after it rendered its decision. The letter itself was a response to a request made by the Tribunal on the record during the hearings in the presence of AMOA's counsel. AMOA argues that the first time there was any mention of this letter was in the separate findings, conclusions and opinion of Commissioner James which were filed with the Federal Register on December 31, 1980, and were published on January 5, 1981. *See* 46 Fed. Reg. 890, 891 nn. 8, 9 (1981). The letter was the subject of AMOA's motion for reconsideration, dated January 26, 1981, which the Tribunal denied on February 5, 1981.

AMOA argues that the Commissioner's dissenting opinion relied upon the BMI letter as important evidence in his argument favoring a $130.00 license fee for jukeboxes. AMOA sets forth various ways in which it would have been able to rebut the alleged import of the letter insofar as it contributed to Commissioner James' determination of the $130.00 fee. We note, however, that AMOA does not appear to contend that the letter had any specific direct effect upon the Tribunal's (in contrast to Commissioner James') determination. Apparently, AMOA argues that Commissioner James' dissenting views created some of upward bias in the Tribunal's result. *See* AMOA Brief at 49.

We think, however, that any prejudice evident in Commissioner James' opinion and attributable to the letter did not affect the result reached by the Tribunal's majority. The Tribunal's differences with Commissioner James were legal and conceptual in nature. Commissioner James essentially adopted ASCAP's view that the Tribunal was required to set a fee within the range of ASCAP's proof, but the other members of the Tribunal rejected any such limiting effect of the ASCAP analogies. Therefore, we do not believe that prejudice from the BMI letter and enclosure has been demonstrated.

CONCLUSION

Ratemaking is an art, not a science. We believe that the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and be subject to future inflationary adjustments. The necessity of avoiding disruption within the jukebox industry justified the $50.00 royalty and its phased-in implementation. On the other side of the coin, the Tribunal also recognized that a reasonable fee for 1980

might become so distorted by inflation before the next "scheduled" adjustment that the addition of an automatic inflation factor was necessary to achieve the goal of the Act to provide reasonable remuneration to copyright owners. In summary, we find no fault with the Tribunal's final rule as promulgated. The petition for review is hereby DENIED.

PETITION FOR REVIEW DENIED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[37 C.F.R. § 306 (1981)]

PART 306—ADJUSTMENT OF ROYALTY RATE FOR COIN OPERATED PHONORECORD PLAYERS

§ 306.1 General.

This Part 306 establishes the compulsory license fees for coin-operated phonorecord players beginning on January 1, 1982, in accordance with the provisions of 17 U.S.C. 116 and 804(a).

§ 306.2 Definition of coin-operated phonorecord player.

As used in this part, the term "coin-operated phonorecord player" shall have the same meaning as set forth in 17 U.S.C. 116(e)(1).

§ 306.3 Compulsory license fees for coin-operated phonorecord players.

(a) Commencing on January 1, 1982 the annual compulsory license fee for a coin-operated phonorecord player, as set forth in 17 U.S.C. 116(b)(1)(A), shall be $25.

(b) Commencing on January 1, 1984 the annual compulsory licensee fee for a coin-operated phonorecord player, as set forth in 17 U.S.C. 116(b)(1)(A), shall be $50, subject to adjustment in accordance with § 306.4 hereof.

(c) In accordance with 17 U.S.C. 116(b)(1)(A), if performances are made available on a particular phonorecord player for the first time after July 1 of any year, the compulsory license fee for the remainder of that year shall be one half of the annual rate of (a) or (b) of this section, subject to adjustment in accordance with § 306.4 hereof.

§ 306.4 Cost of living adjustment.

(a) On August 1, 1986 the Copyright Royalty Tribunal (CRT) shall publish in the FEDERAL REGISTER a notice of the change in the cost of living as determined by the Consumer Price Index (all urban consumers, all items) from the first Index published subsequent to February 1, 1981 to the last Index published prior to August 1, 1986.

(b) On the same date as the notices published pursuant to paragraph (a), the CRT shall publish in the FEDERAL REGISTER a revised schedule of the compulsory license fee which shall adjust the dollar amount set forth in § 306.3 (b) according to the change in the cost of living determined as provided in paragraph (a). Such compulsory license fee shall be fixed at the nearest dollar.

(c) The adjusted schedule for the compulsory license fee shall become effective on January 1, 1987.

APPENDIX C

[46 Fed. Reg. 884-891]

COPYRIGHT ROYALTY TRIBUNAL

37 CFR 306
[Docket No. CRT 80-1]

1980 Adjustment of the Royalty Rate
for Coin-Operated Phonorecord Players

Agency: Copyright Royalty Tribunal.

Action: Final rule.

Summary: The Copyright Royalty Tribunal adopts the rule establishing the rate of royalty payments for the public performance of nondramatic musical works by coin-operated phonorecord players.

Effective Date: February 4, 1981.

For Further Information Contact:
Clarence L. James, Jr., Chairman,
Copyright Royalty Tribunal, (202) 653-5175.

Supplementary Information:

Introduction

17 U.S.C. 804(a)1 provides that the Copyright Royalty Tribunal (Tribunal) shall publish a notice in the Federal Register on January 1, 1980 of the commencement of proceedings concerning the adjustment of royalty rates for coin-operated phonorecord players as provided in section 116. It is further provided that the Tribunal shall render its final decisions in this proceeding within one year from the date of such publication.

Background and Chronology

The Amusement and Music Operators (AMOA) and the three principal music performing rights societies—American Society of Authors, Composers, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc. responded to the Tribunal's notice of January 2, 1980.

On February 13 in the offices of the Tribunal a meeting was held with all interested parties to discuss the economic survey to be conducted by AMOA and to make recommendations on the information to be solicited. The Tribunal and the performing rights societies offered suggestions to be included in the survey but were informed by AMOA that the questionnaire for the survey had already been mailed.

The Tribunal conducted public hearings to receive testimony on the adjustments of royalty rates as provided in section 116 on April 2, 3, 4, 21, and 22. Rebuttal was heard on May 16 and 19, 1980. In addition to the material presented at these hearings, the Tribunal also received written statements and documentary evidence submitted in accordance with the rules of the Tribunal. Proposed findings of fact and conclusions of law were submitted on September 16, 1980 at the direction of the Tribunal.

At a public session on December 10, 1980 the Tribunal made its final determination concerning the royalty rate adjustment for coin-operated phonorecord players.

Summary of Evidentiary Positions of the Parties

The American Society of Composers, Authors and Publishers (ASCAP) and SESAC considered that by application of the standards in 17 U.S.C. Sec. 801(b)(1) a reasonable compulsory license fee for the public performance of all copyrighted musical compositions by a jukebox is $70.[1]

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[1] "Proposed Findings of Fact and Conclusions of Law Submitted by ASCAP and SESAC" September 16, 1980, p. 1.

They also contended that because the royalty rate is to apply for at least a ten year period, the $70 fee should be subject to annual adjustments reflecting the increase in the cost of living as determined by the Consumer Price Index.[2] Moreover they contend that the annual adjustments should commence for the 1982 calendar year.[3]

Although ASCAP and SESAC contend that the record in this proceeding supports a compulsory license rate expressed in dollars or as a percentage of the revenue of each jukebox, they conclude that "at this time and on this record, practical considerations and the stated preference of the jukebox operators * * * convince us that the more appropriate fee for all jukeboxes is a fee expressed in dollars."[4]

These two performing rights societies stated that in order to apply the standards in Section 801(b) they felt compelled to determine a compulsory licensee fee similar to the fee which would be reached on the open marketplace if performing rights societies and jukebox operators were free to negotiate for licenses absent a compulsory license.[5]

With that as a benchmark they concluded that the most useful approach in reaching a marketplace value was to use close marketplace analogies.[6]

Three analogies were used: (a) general establishments, such as bars, grills, restaurants and taverns using mecha-

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[2] Ibid., p. 1.

[3] Ibid., p. 1.

[4] Ibid., p. 2.

[5] Ibid., p. 2.

[6] Ibid., p. 2.

nical music (i.e., music provided by non-live means); (b) background music services; and (c) foreign jukebox operators.[7]

ASCAP's direct case was presented through testimony of Robert R. Nathan, Chairman of Robert R. Nathan Associates, Inc., and Dr. Paul Fagan, ASCAP's Chief Economist and Director of Special Programs.

Mr. Nathan testified that in our economy value is usually determined in the marketplace, and when a regulatory agency must set a rate it should do so based on the most likely parallel or similar economic circumstances relating to the goods or services in question.[8]

Mr. Nathan discussed the four objectives in Sec. 801 which in his opinion the Tribunal must apply in determining a reasonable compulsory license fee. He said that the first objective, maximizing the availability of creative works to the public, means that the rate must be sufficient to maintain the creator's incentive to create the work and to encourage its exploitation. He added that the fee should not be so high as to reduce the demand for music.[9]

The second objective, providing a fair return to the copyright owner and a fair income to the copyright user, is one which would be met by free negotiation between the parties. Mr. Nathan urged the tribunal to consider market experience in parallel areas, pointing out that a fair return to owners and fair income to users does not guarantee every owner a maximum return or every user a profit.[10]

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[7] Ibid., p. 2.

[8] Ibid., p. 20.

[9] Ibid., p. 20.

[10] Ibid., pp. 20-21.

The third objective, Mr. Nathan testified, required the balancing of the relative contributions of the copyright owner and the copyright user. He pointed out that marketplace value is the only effective measure of the relative creative contributions, capital investments, costs and risks of the copyright user and owner.[11]

Mr. Nathan testified that the fourth objective was to minimize the disruptive impact on both the jukebox industry and the established license structure of music performing rights.[12]

Dr. Paul Fagan detailed the three marketplace analogies ASCAP proposed to the Tribunal. The first analogy is to the license fees paid by establishments like restaurants, taverns, bars and grills which use tape recorders, record players or jukeboxes not subject to compulsory license. He testified the lowest such fee for ASCAP alone is $70. When the fees for BMI and SESAC are added, the total minimum fee paid by such establishments is $190.[13] Dr. Fagan stressed that there would be an administrative savings if all three repertories were licensed at once, estimating the resulting total minimum license fee at $140.[14]

The second analogy addressed by Dr. Fagan was to license fees paid by background music services. He said that ASCAP licenses about 700 background music operators. The annual rate charged by ASCAP alone for locations similar to those in which jukeboxes may be found is $27. This rate, however, was described as an interim fee

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[11] Ibid., p. 21.

[12] Ibid., p. 21.

[13] Ibid., p. 24.

[14] Ibid., p. 24.

subject to retroactive adjustment to 1971.[15] Assuming that the rates were adjusted only for inflation, he said that, it would be $52.08 in 1980.[16]

The third analogy testified to by Dr. Fagan was for license fees paid for jukeboxes abroad. He noted that the foreign analogy was particularly appropriate. One, the licenses granted by foreign performing right societies are identical in scope to the American compulsory license. Two, the fees are either negotiated with industry groups or are subject to governmental approval. Three, foreign jukebox operators operate in the same way as their American counterparts. Four, the rates here should be higher than abroad because income levels in foreign countries are generally lower than those in the United States.[17]

The average fee paid by jukeboxes in the nineteen countries ASCAP surveyed is $96.33 and the mean is $70.92.[18]

Dr. Fagan further testified that the proposed $70 fee is one that coin-machine operators can afford, amounting to only 19 cents per day.[19]

Broadcast Music, Inc. (BMI) through testimony by Edward W. Chapin, vice president and general counsel underscored its agreement with ASCAP and SESAC in the adoption of a royalty rate which would vary annually in accordance with the Consumer Price Index.[20]

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[15] Ibid., p. 25.

[16] Ibid., p. 25.

[17] Ibid., p. 26.

[18] Ibid., p. 26.

[19] Ibid., p. 28.

[20] "Proposed Findings of Fact and Conclusions of Law submitted by BMI" September 16, 1980, p. 10.

BMI, based on prior congressional findings, has proposed a royalty rate of approximately $30 adjusted annually in accordance with the CPI.[21]

BMI's proposed royalty rate follows directly from the legislative history and the statutory mandate requiring balancing of economic considerations. Therefore, BMI applies historical changes in the CPI to the $19.70 base specifically recognized by Congress in 1975 as a reasonable fee.[22]

Application of the CPI from 1975 to the $19.70 base results in a royalty rate of approximately $30, adjusted annually.[23]

In BMI's view its proposal represents a compromise between maximizing the return to copyright owners, whose works presents the means by which the users gain their profits, and any economic considerations applicable to the copyright users.[24]

BMI believes the $30 fee, although considerably smaller than many applicable State, local or foreign license fees, can be considered as providing a "fair return" to the copyright owner. Moreover, the $30 fee would amount to approximately 8 cents per day per jukebox—equal to or less than the cost of one play per day—thus it would not deny a "fair income" for the copyright user.[25]

As a consequence, adoption of the proposed rate is likely to "maximize the availability of creative works,"

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[21] Ibid., p. 12.

[22] Ibid., pp. 12-13.

[23] Ibid., p. 13.

[24] Ibid., p. 13.

[25] Ibid., p. 14.

"reflect the relative roles of the copyright owner and the copyright user," and "minimize any disruptive impact on the industries involved."[26]

The Amusement and Music Operators Association (AMOA) presented its case through the testimony of eleven witnesses and the submission of thirty exhibits, the principal one being Exhibit #10, the Peat, Marwick, Mitchell and Company (PMM&Co.) survey of the economic condition of the jukebox operators' business.[27]

AMOA contends that there has been a marked increase in recent years in the numbers of amusement games that are in operation, especially in contrast to the decline in number of jukeboxes that are in operation and that many operators do not segregate their operating expenses for jukeboxes and games.[28]

AMOA estimated that there are between 3000 and 5000 operators who operate between 251,000 and 388,000 jukeboxes in the country.[29]

They introduced testimony which indicated that during the years 1975 through 1978 Rockola, Rowe and Seeburg produced between 38,000 and 42,000 jukeboxes annually, about one-half of which were for the U.S. market.[30]

The PMM&Co survey indicates that on the average a typical operator operated 77 jukeboxes and 225 amuse-

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[26] Ibid., p. 14.

[27] "Proposed Findings of Fact and Conclusions of Law submitted by AMOA," September 16, 1980, p. 5.

[28] Ibid., p. 6.

[29] Ibid., p. 15.

[30] Ibid., p. 16.

ment games, and that jukeboxes and games were both operated in 65% of all locations with 65% of all jukeboxes operating in cities of 40,000 or less.[31]

The AMOA produced testimony that new jukeboxes cost up to $2500 each, and accessories may add another $500.[32] They further indicated that the useful life of a jukebox at the operators' preferred locations is about five years.[33]

They also indicated that jukebox operators purchase phonorecords at an average rate of 2½ to 3 records per box per week, or about 130 to 150 records per box per year.[34]

Although prices per play differ between operators and between different areas popular pricing generally is two for a quarter or five for 50 cents which averages about 10 cents per play.[35]

Several of AMOA's witnesses stressed that their boxes are limited to an income based upon time.[36]

The PMM&Co survey indicates that for the industry at large 18% of the boxes in operation earned for the operators less than $300 per year, and that 47% earned less than $700 per year. For smaller operators of fewer than 40 machines, 23% of the boxes earned less than $300 per year, and 57% earned less than $600 per year.[37]

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[31] Ibid., p. 16.

[32] Ibid., p. 17.

[33] Ibid., p. 17.

[34] Ibid., p. 17.

[35] Ibid., p. 21.

[36] Ibid., p. 22.

[37] Ibid., p. 24.

A report by professors Sequin and Malone of Notre Dame University indicates that over the 40 year period 1940 to 1980, while the Consumer Price Index increased 452%, the average price per play on jukeboxes increased 150%.[38]

AMOA reported statistics from the U.S. Department of Commerce on the jukebox manufacturing business which show a drop in total shipments and sales from a high of about 75,000 units in 1973 to about 38,000 units in 1975, and a continuation at about that level through 1978.[39]

Jukebox operator witnesses offered testimony reflecting a continuing decline in the numbers of jukeboxes that are in operation, citing two basic causes for the decline, (1) the operators' inability to increase prices per play so as to keep up with the rate of inflation, and (2) the loss of jukebox locations due to socio-economic changes such as urban redevelopment, and replacement of jukeboxes by other means of entertainment such as background music, radio, television, discos and live entertainment.[40]

The AMOA, citing evidence of the decline in the jukebox operating business, decreasing revenues and margins of profit, and industrywide reduction in numbers of locations and of jukeboxes in operation, argued strongly that the $8 royalty fee should be left unchanged.[41]

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[38] Ibid., p. 25.

[39] Ibid., p. 26.

[40] Ibid., p. 27.

[41] Ibid., p. 31.

Legal Considerations

The Issue of Burden of Proof

AMOA has asserted that the performing rights organizations have the burden of proof in this proceeding. They cite as authority McCormick, *On The Law Of Evidence*[42] and certain provision of the Administrative Procedure Act.[43]

We find the McCormick rule is inapplicable in the circumstances of this proceeding. The Copyright Act of 1976 mandates review of the interim rate pursuant to Section 804(a)(1). In Section 804 Congress clearly distinguishes between procedures applicable to the 1980 royalty determination and the subsequent 10-year review proceedings. Section 804(a)(1) states:

> (O)n January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter * * *

17 U.S.C. Section 804(a)(1). Section 804(a)(2) states:

> (D)uring the calendar years specified in the following schedule (i.e. every subsequent tenth year for jukebox) any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, *may file a petition declaring that the petitioner requests an adjustment of the rate.* (Italics added)

This proceeding commenced without any petition by an owner or user according to 17 U.S.C. 804(a)(1). The Senate Report recognized the mandatory nature of these proceedings: "This subsection requires that there be a review in 1980 of such royalty rates, and it is mandatory

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[42] Pre-hearing Brief, AMOA p. 6.

[43] Memorandum in Support of AMOA Proposed Finding of Facts and Conclusions of Law, pp. 7-8.

for the CRT to commence such proceedings.'"[44] We conclude that none of the parties has the burden of showing that the Tribunal should examine the fee. We find the statute requires the Tribunal to do so.

Further this proceeding differs from others which may occur in future years. Proceedings in 1990 and each subsequent tenth calendar year will occur only if a copyright owner or jukebox operator petitions the Tribunal for an adjustment of the rate.[45]

We therefore conclude, that while subsequent review proceedings may be initiated only by petition of an interested party, the 1980 review is mandatory. Since none of the parties herein has initiated this royalty rate proceeding, each party carries an equal burden of proof.

The Issue of the Annual Cost of Living

AMOA's position is that the Copyright Act does not permit an annual adjustment for inflation under Section 116. They argue that the approach used by the CRT in Section 118 public broadcasting proceeding is not provided for under Section 116. They further argue that Section 118's reference to "rates and terms" for public broadcasting royalty provides the CRT with authority to adopt the annual cost of living approach, while Section 116's reference only to "rate" limits the Tribunal's flexibility.[46]

Both BMI and ASCAP/SESAC advocate the adoption of a royalty rate which would vary annually in accordance with the Consumer Price Index.[47] As both BMI and

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[44] S. Rep. No. 94-473, 94th Cong., 1st. Sess. (1975), p. 156.

[45] 17 U.S.C. § 804(a)(2).

[46] AMOA Reply Brief to Prehearing Brief of BMI, pp. 5-6.

[47] Proposed Findings of Facts and Conclusions of Law of BMI, p. 13, and Proposed Findings of Facts and Conclusions of Law submitted by ASCAP and BMI, p. 11.

ASCAP/SESAC point out, the Tribunal adopted this approach in its Section 118 public broadcasting, proceeding.

We find that the legislative history of Section 118 shows clearly that the use of the word "terms" has nothing to do with cost of living adjustments. It states:

> The Committee anticipates that the "terms" established by the Commission shall include provisions as to acceptable methods of payment of royalties by public broadcasting entities to copyright owners. For example, where the whereabouts of the copyright owner may not be readily known, the terms should specify the nature of the obligation of the public broadcasting entity to locate the owner, or to set aside or otherwise assure payment of appropriate royalties, should he or she make a claim.[48]

AMOA further claims that the Tribunal is restricted in its application of the Consumer Price Index to the jukebox rate by criteria specified in Section 801(b) (A)-(D) and that it is not so restricted under Section 118.[49]

We find that AMOA's position is at odds with the legislative history of the section. It states:

> Similar considerations (to jukebox royalty standards) are noted in connection with Commission review of rates and terms for public broadcasting in the discussion of Section 118, above.[50]

We conclude that there are no essential differences in the Tribunal's authority with respect to Section 116 and 118 which would permit the Tribunal to provide annual cost of living adjustments in one case and not the other.

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[48] H. Rep. No. 94-1476, 94th Con., 2nd Sess. 118 (1976).

[49] Memorandum in Support of AMOA Proposed Findings of Facts and Conclusions of Law, p. 11.

[50] H. Rep. No. 94-1478, 94th Cong., 2nd Sess. 118 (1976)

We find that there is nothing in the statute or legislative history which could be construed to limit the application of annual cost of living adjustments.

In conclusion, we find that the adoption of adjusted jukebox royalty rate which varies annually with the Consumer Price Index is a proper exercise of Tribunal authority.

The Issue of the Performing Rights Societies Financial Data

AMOA sought to bring into issue in this proceeding the manner of how the performing rights organizations distributed jukebox royalties to their affiliates and members. AMOA argued that § 801(b)(1)(B) of the Copyright Act called for an investigation of the performing rights organizations distribution methods.[51] AMOA further argued that performing rights organizations are not in "compliance" with the Copyright Act unless they distribute royalties among their affiliates and members in accordance with a requirement contained in section 116(c)(5).[52]

Finally AMOA argued that there is no logical way the Tribunal can determine if a change should be made in the compensation that is to be provided without calculation of the specific compensation to individuals.[53] Under AMOA's approach this was the only way that the "fair return" standard of the Act could be met.

In summary AMOA's position in essence was asking the Tribunal to establish the value of individual musical works based on the time and expense incurred by the song-

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[51] AMOA Brief on admissibility of certain exhibits.

[52] *Id.*

[53] AMOA Pre-hearing Brief, p. 9.

writers for each one, together with a value inexplicably derived from the placement of a work on a popularity chart. It then asks the Tribunal to investigate the internal distribution procedures of the performing rights organizations to establish the exact payout for each member or affiliate. A comparison of the two calculations—the costs and the payout—would, according to AMOA, produce the "fair return" calculations supposedly required by the Copyright Act.[54]

BMI argued that the language cited by AMOA "to afford the Copyright owner a fair return for his creative work", reflects the broad goal of the legislation to insure that creators are fairly compensated through adoption of license fees establishing a reasonable value for the use of the Copyright works. We agree. The language in the statute is not a directive authorizing the Tribunal to investigate individual members or affiliates collections from the performing rights organizations.

We find that there is no indication either in the statute or the legislative history, that Congress intended the Tribunal to calculate rates or return for each piece of music and then base royalty adjustments on these rates of return.

We find that the Copyright Act in section 116(c)(4)(B) specifically provides that royalty fees are to be distributed to the performing rights organizations. The section reads in pertinent part:

> (4) The fees to be distributed shall be divided as follows:
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> • • • • •
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> (B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among

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[54] AMOA Pre-hearing Brief, pp. 7-9.

themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

The performing rights organizations are specifically referred to by name in the definition of "performing rights society" set out in section 116(e)(3) of the Act. It is thus our opinion that the Act recognizes a practical necessity for individual creators of music to adequately protect their performing rights and for users, such as the jukebox industry, to conveniently acquire performing rights. We conclude, therefore, that the "fair return" to music copyright owners, *i.e.* the reasonable value of the performing right can be established on a collective basis.

We find nothing in the Copyright Act or its legislative history which indicates that the Tribunal was intended to regulate the internal operations of the performing rights societies. In our opinion the Tribunal's authority is strictly limited to setting applicable royalty fees and establishing the distribution to claimants.

In our opinion section 116(c)(5) establishes authority in the Tribunal to promulgate regulations permitting prospective claimants to enter establishments and sample jukeboxes to establish the basis of a claim. We find, however, that this section does not require that performing rights organizations must establish that they have segregated jukebox royalties from royalties collected from other sources, and therefore, since the Copyright Act does not create authority in the Tribunal to establish such regulations, no such regulations have been adopted.

Determination of Royalty Rate

The AMOA Case

The Tribunal finds that the case presented by the AMOA, including the industry survey, has failed to provide reliable data concerning the operating expenses, revenues, or return on investment on jukebox operators.

The Tribunal convened a conference of the parties on February 13, 1980 in order to permit the Tribunal and all of the parties to make suggestions concerning the contents of a questionnaire which would be used by AMOA to survey the financial condition of jukebox operators. At that conference the representatives of AMOA stated that it was too late to revise the questionnaire.

We note the limited response rate to the questionnaire, estimated by Peat Marwick to be approximately 14%. Dr. John Scarbrough, the Peat Marwick manager in charge of the survey, testified:

> I wouldn't argue very hard if you wanted to say that it was not a good response.[55]

The record of this proceeding contains detailed testimony reciting the procedures utilized in the preparation and distribution of the questionnaire, which present significant questions as to the survey's methodology and objectivity, as well as the nature and scope of the data provided.

We also note that the survey information is not consistent with other evidence in this record, such as 1979 Playmeter survey of the jukebox industry[56] and a survey of the industry published in the March 1978 issue of Re-

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[55] Transcript, April 4, 1980, p. 61.

[56] ASCAP Exhibit 8.

play.[57] We have reviewed the testimony of the AMOA witnesses—five jukebox operators, representatives or distributors of the three American jukebox manufacturers, a "one-stop" distributor of records, and a trade association official. We find that this testimony does not provide a basis for forming any representative picture of the jukebox industry nor does it create a foundation for the industry's claim of economic hardship. The testimony does establish an industry practice to turn over 50% of the gross revenues from jukeboxes to the location owner.

The BMI Case

BMI proposed that we determined the rate by applying the Consumer Price Index from 1975 to a proposed jukebox royalty fee of $19.70 that had been mentioned in a congressional committee report. We have concluded that this approach is not in accord with our statutory responsibilities in this proceeding.

The ASCAP/SESAC Case

In reaching our determination in this proceeding, we found the ASCAP/SESAC *concept* of basing the rate on marketplace analogies to be most attractive. We have examined the three marketplace analogies urged upon us by ASCAP/SESAC—the licenses fees paid by general establishments using mechanical music, background music services, and foreign jukebox fees.

These anologies individually and collectively are subject to limitations and distinguishing features. We believe that certain of the distinctions set forth in the AMOA pleading have validity.[58] While acknowledging that our rate cannot

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[57] BMI Rebuttal Exhibit A.

[58] AMOA Proposed Findings, p. 40-42.

be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria.

Tribunal Rate

We find that a per box payment of $50 is a reasonable fee for the jukebox industry as a whole. We have phased in the rate to accord the jukebox industry an opportunity to adjust, since in our view the jukebox industry has never previously paid reasonable compensation for the use of copyrighted music. We note that ASCAP/SESAC, in their proposed findings, concluded that an interim fee would be appropriate "to afford the coin machine industry an opportunity to adopt to compulsory licensing at marketplace rates."[59] Consequently, the adjustment of the jukebox rate on January 1, 1982 will be limited to $25.

We are aware that some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues. The Tribunal is satisfied that adequate attention has been given to the small operator, including the adoption of an amendment to the proposed fee schedule that was proposed for the benefit of such operators.

Based on the Playmeter and Replay surveys and other evidence in this record, we believe that it would be reasonable for some operators to be paying more than $50. If the Tribunal had adopted a fee schedule based on such factors as per box revenue or the number of boxes owned by a particular operator, a higher payment by certain operators or for particular boxes might be warranted. The Tribunal has chosen to adopt a flat rate for all boxes—the course urged upon us by all parties in this proceeding.

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[59] ASCAP Findings, p. 3.

It is not reasonable that the fees adopted in this proceeding should remain unchanged until at least 1990. We have therefore made provision for a single cost of living adjustment.

Statutory Criteria

We have reached our decision in full recognition of the application to this proceeding of the criteria in 17 U.S.C. 801(b). We observe that the criteria were not drafted for specific application exclusively to the determination of the jukebox rate. The Tribunal has analyzed each of the criteria.

To Maximize the Availability of Works

The first statutory objective of our rate determination listed in Section 801(b)(1) is "To maximize the availability of creative works to the public". We do not maintain that the jukebox rate is crucial to assuring the public of the availability of creative works. As have been observed in the pleadings, musical works were created and exploited for many years, during which, in our view, songwriters and publishers were unjustly denied reasonable compensation for a commercial use of their works. We concur in the ASCAP/SESAC finding that "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public."[60] We find nothing in this record which would justify any reasonable concern that the schedule we have adopted will deprive the public of access to music.

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[60] ASCAP Findings, p. 4.

Fair Return to the Copyright Owner and
Fair Income for the Copyright User

The second statutory criteria is "To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions." We have previously discussed our conclusion that, within the limitations necessarily inherent in a flat industry rate, our schedule affords the copyright owner a fair return. We reject the contention that copyright owners are paid for jukebox performances by mechanical royalties derived from record sales. We recognize that performing rights are distinct from recording rights. The Congress has determined that copyright owners are entitled to be paid reasonable fees for both. The Tribunal also rejects the contention that no adjustment of the royalty fee should be made unless the copyright owners established their "need to receive" an increase.

We have above given our analysis of the testimony presented by the jukebox industry. We find nothing in that testimony which would warrant a conclusion that our schedule will deprive the jukebox operator of a fair income under existing economic conditions. In adopting the rate, we have given sympathetic consideration to the circumstances of small jukebox operators, and reflected in the determination of our rate that certain boxes produce modest revenues.

Relative Contributions

The third statutory criteria is "To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for

their communication." On the basis of the record in this proceeding we have no basis for concluding that jukebox operators and owners of establishments with jukeboxes make any unique or distinctive contribution concerning creativity, technology, capital investment, cost, risk, and the opening of new markets for creative expression and media for their communication. We find in this record no basis for a conclusion that the efforts of jukebox operators through the selection of records and their performance promote the dissemination of songs in any significant manner. We find that the owners of the establishments in which jukeboxes are located do not make a contribution in the areas encompassed in this statutory objective.

On the other hand, the contribution of the copyright owner whose works are performed under the compulsory license directly benefits the jukebox operator and location owner.

Disruption of the Industries

The fourth statutory criteria is "To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." We find that a failure of this Tribunal to establish a reasonable fee for jukebox performance could interfere with performing rights societies receiving reasonable fees from similar users of music, whose rates are not established in accordance with statutory provisions.

We cannot on the basis of the evidence presented by the jukebox industry find that our schedule will have a disruptive impact on the structure of the jukebox industry or disturb generally prevailing industry practices. By introducing the fee schedule in two phases, we have, in our view, adequately reflected in our decision the objective of this statutory criteria. The jukebox industry pays rea-

sonable market prices for all other goods and services they require. We hold that they can pay the schedule we have adopted for the central commodity of their boxes without adverse impact.

Conclusion

On the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria, the Tribunal has adjusted the royalty rate for coin-operated phonorecord players to $50 per machine. That rate takes account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators.

In order to ease the impact of a rate increase upon the jukebox industry and in recognition of the fact that royalty payments for jukeboxes have been in effect in the United States only since 1978, the Tribunal has elected to stagger the introduction of the rate. It will take effect on January 1, 1982, and for two years, from 1982 to 1984, the rate will be half—$25.

Because the $50 rate set as a result of this proceeding cannot be reviewed until 1990, the Tribunal feels that the copyright owners might not be fairly compensated unless a provision is included to adjust for inflation. This adjustment takes place on January 1, 1987, and is based upon the Consumer Price Index convering the period February 1981 to August 1986.

Accordingly, pursuant to 17 U.S.C. 801(b)(1) and 804(e), 37 CFR Chapter III is hereby amended as follows:

By adding a new Part 306, to read as follows:

[The text of the rule, which is reprinted in Appendix B, *supra*, is omitted here.]

Adopted December 10, 1980.

Note.—Commissioners Brennan, Coulter and Burg concurred in the above opinion. Commissioner Garcia disagreed with the conclusion reached and has filed a separate conclusion. Commissioner James has filed separate Findings of Fact, Conclusions and Opinion.

CLARENCE L. JAMES, JR.,
Chairman, Copyright Royalty Tribunal.

SEPARATE CONCLUSION OF COMMISSIONER GARCIA

It is my considered opinion and thus my conclusion that the royalty rate increase should have been $30.00 and $60.00.

SEPARATE FINDINGS OF FACTS, CONCLUSIONS AND OPINION OF COMMISSIONER JAMES

I cannot support the findings of facts, the conclusions reached from those facts, and the specific rationale of the majority of the members of the Tribunal. In my opinion their determination of an equitable and reasonable statutory rate is unsupported by the record in this proceeding.

This is a proceeding to adjust the reasonable copyright royalty rate as provided for in section 116. The statutory authority which governs the Tribunal in this adjustment, states that the rate shall be calculated to achieve certain enumerated objectives. They are as follows:

1. To maximize the availability of creative works to the public;

2. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

3. To reflect the relative roles of the copyright owner and the copyright user in the product made

available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets of creative expression and media for their communication;

4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The compulsory license fee requires payment to copyright owners for use of their property by others, preventing free negotiation in the marketplace as to value. Thus, the issue before the Tribunal was value in the marketplace. The legislative history of the Copyright Act and the record in this proceeding supports the proposition that the Tribunal must determine a license fee comparable to the fee reached in the open marketplace by analogous music users. Because performing rights societies and jukebox operators are not free to negotiate, the only fair, logical and equitable approach to establishing a compulsory license fee is on the basis of marketplace value.

It is therefore my opinion that to determine marketplace value, the Tribunal can only rely on marketplace analogies. Based on the record in this proceeding, it is clear that the marketplace guidelines of other analogous music users, provide the *only* credible evidence in the record to establish a "reasonable" fee. Negotiated fees by analogous music users, which are identical or similar, based on this record is the only indicator of true market value.[1]

The above position is supported by ASCAP's expert economic witness, Robert E. Nathan. Mr. Nathan testified that, "In our economy, value is usually determined in the marketplace. When a regulatory agency must set a rate, it should do so based on the most likely parallel or similar

[1] Tr. 4/2 p. 23, pp. 25-32, p. 57, pp. 73-74; Tr. 4/3 p. 124.

economic circumstances relating to the goods and services in question.'"[2]

In this record the only evidence of marketplace value was based on close marketplace analogies of other music users.[3] The evidence in the record provided three such close marketplace analogies:

1. License fees paid by general establishments (on location rates);

2. License fees paid by background operators;

3. The licensing fee arrangement and foreign countries.[4]

The first analogy is license fees paid by establishments which use tape recorders, record players, or free jukeboxes. Evidence offered by ASCAP indicated the minimum fee for such an establishment is $70.[5] Evidence offered by BMI indicated that the minimum fee is $60 per year.[6] SESAC offered no evidence in this regard. Further the evidence indicated that the maximum fee for ASCAP for this type of establishment in $490, and for BMI $240. Combining the minimum for both ASCAP and BMI would result in an annual fee of $130. This evidence was uncontroverted or refuted by AMOA.

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[2] Tr. 4/2 pp. 22-23.

[3] Tr. 4/2 p. 66; ASCAP/SESAC Pre-Hearing Statement pp. 10-12; Charles T. Duncan's letter to Chairman 5/12/80 with enclosure.

[4] Ibid.

[5] Tr. 4/2 p. 66; ASCAP/SESAC Pre-Hearing Statement pp. 10-12.

[6] Charles T. Duncan's letter to Chairman 5/12/80 with enclosure.

The second analogy was license fees paid by background music service. Both ASCAP[7] and BMI[8] indicated that the fees, charged under this category, have been the subject of litigation since 1971 and consequently have been frozen since that time. Because current ASCAP and BMI fees do not reflect the rate of inflation since 1971, it was not possible to ascertain the marketplace value or background music.[9]

The third analogy is license fees paid for jukeboxes abroad.[10] In my opinion, any consideration of foreign fees by the Tribunal must be excluded. Foreign fees reflect different licensing systems and cultural values. Further, the foreign fees are applied based on various criteria. In essence, the foreign fees involve such a diversity of circumstances as to be of little or no probative value.

In essence, the majority reached a conclusion on the premise that a true market value rate would result in too large an increase in fees. The majority was set on course by what they deemed were the guiding standards of the statute which referred to minimizing the disruptive impact on the economic structure of the industries involved. It was the majority view and opinion that a large increase in fees would be oppressive to the industry and would "impact on small operators."[11] In my opinion the majority

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[7] Tr. 4/2 pp. 63-64.

[8] Charles T. Duncan's letter to Chairman 5/12/80 with enclosure.

[9] ASCAP/SESAC Pre-Hearing Statement pp. 13-14; Proposed Findings of Facts and Conclusions of Law submitted by ASCAP and SESAC p. 25, and Charles T. Duncan's letter to Chairman 5/12/80 with enclosure.

[10] ASCAP/SESAC Pre-Hearing Statement p. 15; Tr. 4/2 p. 66; Findings of Facts and Conclusions of Law submitted by ASCAP and SESAC pp. 25-26.

[11] Tr. 12/10 pp. 4-5.

misconceived the evidence in the record when this standard was applied. First, it is apparent that the standard was applied only to jukebox operations. There apparently was no consideration given to significant disruption in existing market prices for performing rights societies, fees paid by other analogous music users. The majority, in essence, appears to have reached a conclusion based on an ability to pay theory.[12]

The real economic impact of increased fees on jukebox operators cannot be determined from this record.[13] Economic data supplied by AMOA was of questionable reliability and validity and could not be used as a basis for any rate determination.[14] In addition, the record simply does not support AMOA testimony that jukebox operators are destitute or will go out of business if fees are increased.

In fact, the evidence is clear and convincing to the contrary. The record in this proceeding shows that coin machine operators pay fair market price for all goods and services they use.[15] Further it has been established in the record that jukebox operators have traditionally shared one half of the gross revenue with a joint venture partner who neither contributes to the venture nor takes any risk.[16] This arrangement is neither bargained, nor negotiated, but traditionally given away. How is it that jukebox operators can claim destitution or inability to pay a fair and rea-

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[12] Determination of Royalty Rate by majority, *supra*.

[13] Findings of Facts and Conclusions of Law submitted by ASCAP and SESAC, p. 7.

[14] AMOA Survey; Tr. 4/3 p. 36; pp. 51-53; and Findings of Facts and Conclusions of Law submitted by ASCAP and SESAC, pp. 33-46.

[15] Tr. 4/21 p. 135; Tr. 4/2 pp. 24-25, 108-109.

[16] Tr. 4/4, p. 120; Tr. 4/21, p. 98, 138; Tr. 4/22, pp. 50-80.

sonable rate, when for years over one half of their revenue has been given away? Even the small operator, the concern of the majority, split revenue 50-50 with the establishment owner. Is it appropriate for jukebox operators to come before this Tribunal and claim economic hardship?[17] In my opinion it would be far better to reanalyze or reevaluate the traditional practice of giving away one half of the revenue than to seek economic redress from this Tribunal.

The rate established by the majority is not reasonable. Nor does it afford the copyright owner a fair return for his creative work. There is no evidence in the record to support the rate, no logic behind it and no equity in it.

In my opinion the record is replete with evidence that the minimum reasonable marketplace value fee should be $130, not $25 or $50. I find that the record is void of any valid argument that once a reasonable rate is established there should be a discount because of economic hardship. There is simply no probative evidence in the record that jukebox operators should not and can not pay rates comparable to those paid by other analogous music users for the same product.[18]

In conclusion, there is substantial evidence in the record to show that jukebox operators have the ability to pay a fair, equitable and reasonable rate. They already give one half of their revenues away. Further, I find $130, as a minimum, is a reasonable fee based on market value, and that it meets each of the standards of 17 U.S.C. 801(b).[19]

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[17] Tr. 5/19, pp. 52-54; ASCAP Exh. R-4, pp. 47-51; R-22, pp. 16-17; Tr. 5/19, pp. 49-52.

[18] ASCAP Exh. R-4, pp. 47-51; Tr. 4/21, pp. 72-74, 98, 102-4, 134 and 138; Tr. 4/22, pp. 73-76 and 99.

[19] Findings of Facts and Conclusions of Law submitted by ASCAP and SESAC, pp. 3-11.

APPENDIX D

Section 116 of the Copyright Revision Act of 1976, 17 U.S.C. § 116, provides in pertinent part:

> (a) Limitation on Exclusive Right.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:
>
> . . . .
>
> (2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).
>
> (b) Recordation of Coin-Operated Phonorecord Player, Affixation of Certificate, and Royalty Payable Under Compulsory License.—
>
> (1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:
>
> (A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available on that particular phonorecord player, the operator shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation, an application containing the name and address of the operator

of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and deposit with the Register of Copyrights a royalty fee for the current calendar year of $8 for that particular phonorecord player. . . .

Section 801 of the Copyright Revision Act of 1976, 17 U.S.C. § 801, provides in pertinent part:

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) To make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. . . .

Section 804 of the Copyright Revision Act of 1976, 17 U.S.C. § 804, provides in pertinent part:

> (a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2)(A) and (D)—
>
> (1) on January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and
>
> (2) during the calendar years specified in the following schedule, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. . . .
>
> . . . .
>
> (C) In proceedings under section 801(b)-(1) concerning the adjustment of royalty rates under section 116, such petition may be filed in 1990 and in each subsequent tenth calendar year.

Office-Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-97

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it was arbitrary and capricious for the Copyright Royalty Tribunal, in determining a reasonable fee for coin-operated phonorecord players (jukeboxes) under Section 116 of the Copyright Act of 1976, to consider various license fees received by performing rights societies and jukebox fees paid in foreign countries.

2. Whether the Tribunal correctly concluded that Section 801(b)(1)(B) of the Act, which states that the fee should be "calculated to achieve" several objectives, including affording "the copyright owner a fair return for his creative work," does not require the agency to engage in cost analyses of the type utilized in public utility rate proceedings.

3. Whether the Tribunal exceeded its authority under Section 801 of the Act "to make determinations concerning the adjustment of reasonable copyright royalty rates" when it set a fee, which under the Act is not subject to administrative reexamination for ten years, according to a flexible schedule that phases in the fee during the initial two years and adjusts for inflation during the last three years of the ten-year period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 676 F. 2d 1144. The opinion of the Copyright Royalty Tribunal (Pet. App. 35-63) is published at 46 Fed. Reg. 884.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. The petition for a writ of certiorari was filed on July 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Copyright Act of 1976, 17 U.S.C. (Supp. IV) 101 *et seq.*,[1] are set forth at Pet. App. 64-66.

[1]Unless otherwise noted, any reference to 17 U.S.C. relates to Supplement IV of the 1976 edition of the United States Code.

STATEMENT

1. Prior to 1976, a person could publicly perform a copyrighted non-dramatic musical work in a coin-operated phonorecord player (jukebox) without incurring liability to the copyright owner. 17 U.S.C. (1976 ed.) 1(e). In 1976, Congress amended the Copyright Act to remove the jukebox exemption.[2] Under the new Act, a jukebox operator could continue these performances without infringing the copyright by paying a royalty fee for a "compulsory license." Congress imposed, as an interim compromise measure, a fee of $8 per jukebox per year.[3] 17 U.S.C. 116(b)(1)(A). Congress also created a new agency, the Copyright Royalty Tribunal, to set these fees in the future. 17 U.S.C. 801.[4] Section 801(b)(1) provides that the rates are to be "reasonable" and "calculated to achieve" a number of "objectives":

> (A) To maximize the availability of creative works to the public;
>
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

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[2]Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. Congress found that the "jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer * * *." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 113 (1976).

[3]The $8 fee did not reflect a level thought by Congress to be appropriate, but was a political compromise. See Pet. App. 18-19, quoting H.R. Rep. No. 94-1476, *supra*, at 113; S. Rep. No. 94-473, 94th Cong., 1st Sess. 96-97 (1975).

[4]The Tribunal also sets compulsory license fees for making phonorecords of nondramatic musical works (Section 115) and for distant retransmission by cable of non-network television and radio signals (Section 111).

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The new Tribunal was directed to commence proceedings "concerning the adjustment" of jukebox rates on January 1, 1980. 17 U.S.C. 804(a)(1). Under the Act, the Tribunal may not commence further rate adjustment proceedings unless an applicant with a significant interest in the royalty rate requests such proceedings; such a petition may be filed in 1990 and in every tenth year thereafter. 17 U.S.C. 804(a)(2)(C).

2. Pursuant to the Act, the Tribunal conducted rule making proceedings in 1980 to establish the new jukebox rate. Three performing rights societies appeared on behalf of copyright owners;[3] jukebox operators were represented by petitioner Amusement and Music Operators Association (AMOA), their trade association. All of the parties agreed that the Tribunal should adopt a flat rate, as opposed to a sliding scale fee based upon individual jukebox revenues (Pet. App. 53). However, the proposed fees varied widely (see *id.* at 36-44). At the conclusion of the proceedings, the Tribunal set the royalty fee at $50 per jukebox per year. The new fee would be phased in, with an initial fee of $25 in 1982 and 1983. The full $50 fee would be collected in 1984. In

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[3]American Society of Authors, Composers, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

1987 and subsequent years, however, the fee would be adjusted to reflect changes in the Consumer Price Index between 1981 and 1986. 37 C.F.R. Part 306 (Pet. App. 33-34).

In reaching this result, the Tribunal rejected petitioner's argument that the Act required an inquiry into the "rate of return" for individual composers of creative works (Pet. App. 48-50). In addition, the agency found that the economic evidence presented by petitioner in support of its proposal to leave the $8 royalty fee unchanged did "not provide a basis for forming any representative picture of the jukebox industry" and did not "create a foundation for the industry's claim of economic hardship" (*id.* at 52).[6] At the same time, the Tribunal concluded that BMI's proposed fee of approximately $30 was arrived at in a manner inconsistent with the agency's statutory duty to determine a reasonable fee (*ibid.*).[7]

The Tribunal also rejected the request jointly presented by ASCAP and SESAC for a fee of $70. This proposal was based upon the lowest figure within a range of figures derived from three "marketplace analogies": (1) $140, representing a combination of ASCAP, BMI, and SESAC fees for music at restaurants, bars, and taverns, and not subject to compulsory license (Pet. App. 39); (2) fees for background music services, approximately $52 (*id.* at 39-40); and (3) compulsory license fees imposed in foreign countries, which averaged $96 (*id.* at 40). The Tribunal

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[6]Petitioner's presentation was based upon a survey to which only 14% of jukebox operators responded and the results of which conflicted with other published industry data (Pet. App. 51).

[7]The BMI proposal was derived from a fee of approximately $19 found in several legislative reports, adjusted to reflect changes in the Consumer Price Index since 1958, when the $19 figure first appeared (Pet. App. 28, 40-42).

found the ASCAP/SESAC presentation "most attractive," but cautioned (*id.* at 52-53; emphasis added; footnote omitted) that

> [t]hese analogies individually and collectively are subject to limitations and distinguishing features. *We believe that certain of the distinctions set forth in the AMOA [proposed findings] have validity.* While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria.

The Tribunal found that $50—a figure substantially below the $70 proposal advocated by ASCAP/SESAC—was reasonable and best advanced the competing goals of Section 801(b)(1) (Pet. App. 53-57). The Tribunal concluded that the phasing-in of the fee would alleviate any disruptive impact to the jukebox industry and that the inflation adjustment was needed to insure that copyright owners were fairly treated in view of the fact that the rate is to remain in effect until at least 1990 (*id.* at 56-57).[8]

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[8]Two members of the Tribunal filed dissenting opinions urging that the fee should have been set at a higher level. Commissioner Garcia, without elaboration, stated that she would have set the fee at $60, phased in initially at $30 (Pet. App. 58). Commissioner James felt that the only credible evidence of marketplace value was presented by ASCAP/SESAC (*id.* at 59). Furthermore, Commissioner James believed that the majority was too solicitous of the jukebox industry's alleged hardship and had not sufficiently considered the existing disruption to copyright owners (*id.* at 62). He believed that the agency should have set a fee of at least $130 in order to satisfy the statutory standard (*id.* at 63).

3. ASCAP and AMOA petitioned for judicial review pursuant to Section 810 of the Act.[9] The court of appeals affirmed the decision of the Tribunal in all respects (Pet. App. 1-32). The court held that the agency acted lawfully when it used the ASCAP/SESAC analysis as a starting point in determining an appropriate royalty fee (*id.* at 26-27; citations omitted):

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets * * * and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices. * * * Moreover, we believe that ASCAP/SESAC presented the most credible and relevant evidence before the Tribunal. The arguably analogous musical fees provide substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark.

The court of appeals sustained the Tribunal's refusal to attempt to set the fee by determining "the value of individual musical works based on the time and expense incurred by songwriters in producing each work, together with a

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[9]Under this provision, the United States Court of Appeals has jurisdiction to review the Tribunal's final decisions under the standards set forth in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see Pet. App. 10).

value derived from the placement of a work on a popularity chart" (Pet. App. 7-8). The court observed that the Tribunal's approach of utilizing evidence of composite value was somewhat analogous to the Federal Power Commission's approach of relying on composite costs in setting uniform area rates for wellhead sales of gas under the Natural Gas Act (*id.* at 8 & n.3).

The court of appeals also upheld the flexible structure of the fee (Pet. App. 22; footnote omitted):

> We believe that both the phase-in-mechanism and the inflation adjustment, which cut in opposite directions, merely demonstrate a flexibility with which Congress intended to endow the Tribunal in making its determinations. * * * There is nothing in this language [17 U.S.C. 801(a)(1)] to preclude a reasonable royalty from including a device to ease the disruption attendant upon a new fee substantially departing from the current level; in fact, section 801(b)(1)(D) imposes the contrary requirement. * * * Similarly, a cost of living or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act.

ARGUMENT

The basic question in this case is whether the royalty fee established by the Tribunal for coin-operated phonorecord players is consistent with the standards set forth in Section 801(b)(1) of the Copyright Act. The decision of the court of appeals upholding the Tribunal's determination is correct, does not conflict with the decision of any other court, and does not warrant review.

1. Petitioner asserts that in arriving at a $50 fee the Tribunal improperly utilized the ASCAP/SESAC analogies because they are "all instances of monopoly pricing"

(Pet. 11). Even if petitioner's premise is correct, it does not follow that the court of appeals erred in affirming the Tribunal's final rule.[10]

Contrary to petitioner's contention (Pet. 11), the Tribunal did not "rel[y] solely" on the analogies. As the court of appeals correctly observed, they were used simply as "points of reference to be weighed together with the entire record and the statutory criteria" (Pet. App. 27). Nor did the Tribunal find them "conclusive" (Pet. 11). Rather, the Tribunal acknowledged that its determination could not be "directly linked" to the ASCAP/SESAC data (Pet. App. 52-53). The resulting royalty fee determined by the Tribunal substantially departed from the figure sought by ASCAP and SESAC.

It is thus apparent that the agency in this case simply began its inquiry from the only credible reference points presented by any of the participants in the rule making proceeding. Having properly rejected petitioner's evidence as unreliable, a point not contested here, the Tribunal turned its attention to the useful evidence remaining. See *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 525 (1981). In making its determination as to an appropriate fee, however, the agency was careful to recognize the limitations of that evidence. The court of appeals found this approach to be a "quite appropriate and

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[10]We question petitioner's blanket characterization of all the analogies as involving "monopoly pricing." The analogy described by ASCAP's witness as "particularly appropriate" was for license fees paid for jukeboxes in foreign countries. These fees are either negotiated with industry groups or are subject to government approval (Pet. App. 40). The record reflects that foreign fees ranged widely, from $31.70 in Greece to $2,000 in Paris. The record also showed that the jukebox fee in England was 37.50 pounds, a figure almost identical to the rate for background music in an English pub. ASCAP/SESAC Proposed Findings at 26-28.

normal" exercise of the agency's rate making function (Pet. App. 26). Given the nature of the record below, the agency's limited consideration of the analogies proferred by ASCAP/SESAC was perfectly reasonable.

2. Section 801(b)(1) of the Act requires royalty fees for jukebox performances and for recording songs to be "reasonable." Congress provided additional guidance, requiring that the rates be "calculated to achieve" a series of "objectives."[11] One of the objectives is to "afford the copyright owner a fair return for his creative work." 17 U.S.C. 801(b)(1)(B). Petitioner advocated an interpretation of this provision that would have required the Tribunal to engage in a "cost of service" analysis with respect to artists. The Tribunal concluded that neither the language of the Act nor its legislative history supported imposition of this improbable burden upon copyright owners (Pet. App. 48-50). The court of appeals ruled (*id.* at 29-30) that petitioner's argument was undercut by Section 116(c)(4)(B) of the Act, which provides that the fees may be collectively awarded to the performing rights societies. The court observed that this statute "evinces Congress' recognition of the collective nature of the ratemaking process in these circumstances" (Pet. App. 30). As the court explained (*ibid.*), "we believe it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material."

The court of appeals was clearly correct in rejecting petitioner's attempt to superimpose concepts applied in public utility ratemaking proceedings in the vastly different context presented here. Indeed, the notion of ascertaining a

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[11]These objectives are not "requirements," as petitioner asserts (Pet. 18). They are competing policies to be considered in selecting a reasonable rate. See *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F. 2d 1, 9 (D.C. Cir. 1981).

creative artist's "rate base" or "cost of service" seems patently absurd on its face. The market determines, when it can, the "fair return" for a melody. The Tribunal's inquiry into *value* is thus the most appropriate approach. A showing that some composers have large incomes and low costs would have little or no relevance in determining a reasonable fee.

Moreover, petitioner's reliance (Pet. 18-19) on *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F. 2d 1 (D.C. Cir. 1981), is misplaced. That case involved the phonorecord fee for recordings under Section 115 of the Copyright Act. It is true that the "fair return for creative work" objective in Section 801(b)(1)(B) applies both to the phonorecord fee in Section 115 as well as to jukebox fees under Section 116. In contrast to the jukebox fee, however, phonorecord fees are generally paid to individuals. Thus, the fact that the court in *Recording Industry* approved the Tribunal's assessment of evidence relating to copyright owners' royalty incomes (662 F. 2d at 10-11 & n.25)[12] would not demonstrate that the Tribunal acted arbitrarily here in refusing to engage in a similar analysis. Indeed, the court in *Recording Industry* observed that "the 'fairness' of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service ratemaking; a broader inquiry is called for." 662 F. 2d at 9 (footnote omitted). Furthermore, we note that the Tribunal observed in this case that the jukebox fee level would have only a marginal or incremental effect

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[12]Petitioner errs in asserting (Pet. 19 & n.14) that the Tribunal in *Recording Industry* considered evidence of copyright owners' *costs*. Instead, the evidence adverted to by the court in *Recording Industry* showed that copyright owners' *royalties* had declined over time in comparison to copyright users' royalties and to wholesale record prices. 662 F. 2d at 11 n.25. Since, in the past, jukebox operators paid *nothing* to the copyright owners for the exploitation of their works, similar evidence was not available in this case.

on creative effort (Pet. App. 54). In *Recording Industry*, on the other hand, "[t]he Tribunal found that the current rate was too low to provide a financial incentive that would maximize the production of creative works * * *." 662 F. 2d at 11.

3. Finally, contrary to petitioner's contention (Pet. 20-23), the Tribunal did not exceed its statutory authority in setting a flexible fee schedule, with a phase-in device to minimize disruptive impact and an inflation adjustment to maintain the relative value of the fee after 1986.

In Section 801(b)(1), Congress explicitly directed the Tribunal "to make determinations *concerning the adjustment* of *reasonable* copyright royalty rates * * *" (emphasis added). As the court of appeals correctly concluded (Pet. App. 22), this language empowered the Tribunal to adopt a flexible schedule that provides both for easing the disruptive effects on the jukebox industry of imposing a fee substantially higher than the prevailing fee[13] and for maintaining the real value of the new fee by means of an automatic inflation adjustment mechanism. See *Recording Industry Association of America* v. *Copyright Royalty Tribunal, supra,* 662 F. 2d at 17 (upholding Tribunal's adoption of automatic rate adjustment mechanism in phonorecord fee proceeding). If the Tribunal had acted here on the basis of petitioner's argument that it may not establish automatic fee adjustments, the Tribunal presumably would have selected a higher fee in order to incorporate future inflationary expectations. Such a fee would have been more disruptive at its inception and less likely to achieve a balancing of the goals set forth in Section 801(b)(1).

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[13]Section 801(b)(1)(D) provides that the fee adopted by the Tribunal shall be calculated, *inter alia*, "[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

Furthermore, the mere fact that the statute provides for periodic review of the fee at ten-year intervals (17 U.S.C. 804(a)(2)(C)) does not support petitioner's contention (Pet. 20-21 & n.16) that Congress intended the fee established by the Tribunal in 1980 to remain frozen for a decade at a fixed dollar level. Instead, the legislative history shows that Congress, which created the Tribunal without a permanent staff to perform its professional responsibilities (see *National Cable Television Association* v. *Copyright Royalty Tribunal*, No. 81-1005 (D.C. Cir. Sept. 10, 1982), slip op. 23 n.74), "has chosen to stagger the times for review of the various rates established under the bill so as to balance the workload of the [Tribunal]." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 173 (1976).

Petitioner errs in relying (Pet. 22) on the Tribunal's rejection of an inflation adjustment mechanism in the very different context of cable television fees. In its recent decision upholding the Tribunal's determination in the cable television fee proceeding, the D.C. Circuit summarized the court of appeals' holding in this case and noted that there are "certain clear differences between the Tribunal's authority to set cable rates and its jurisdiction over the [jukebox industry]"—differences that warranted the different results reached in the two cases. *National Cable Television Association* v. *Copyright Royalty Tribunal, supra*, slip op. 13. The court pointed out that "the operators of jukeboxes pay royalties that contrast sharply both in form and in the manner of adjustment with those required of cable users. While the cable provisions key rates to a percentage of gross receipts attributable to use of the copyrighted material, the * * * jukebox sections of the Act set out fixed dollar amounts that must be paid according to the number of 'copies' made by the licensee." *Id.* at 14 (footnote omitted). In addition, Congress recognized that "the reasonableness of the [jukebox] rates could change over time and therefore

delegated to the Tribunal the essentially legislative task of revisiting them every ten years. Thus, in periodic review of the rates, the Tribunal must determine 'reasonable' fees in light of four broad objectives of copyright law. In contrast, the cable provisions permit rate adjustment 'solely' for the purpose of maintaining the dollar value of the initial rate schedule." *Id.* at 15 (footnotes omitted). The D.C. Circuit accordingly concluded (*id.* at 16; footnotes omitted):

> In the face of these differences in its authority to adjust rates, the Tribunal could reasonably conclude that the purpose of the periodic review provisions, and therefore the effect of interim adjustments, varies among the different industries covered by the Act. The wide-ranging nature of the * * * jukebox proceedings, as well as the long history of copyright law for phonographs, apparently led Congress to conclude that rulemakings conducted more frequently than every ten years would be unnecessarily time-consuming and expensive. Since an automatic inflation adjustment does not require reconsideration of the broad policy objectives addressed every ten years, it does not frustrate the purpose of periodic review in [that] field[]. With respect to cable, on the other hand, these concerns seem less acute. In that area, the Tribunal must simply monitor the rate base selected by Congress to see that it keeps pace with inflation. Congress could have easily required the agency to undertake this predominantly ministerial task every year, especially since both inflation and the structure of subscriber charges are likely to change rapidly. Instead, it expressly limited the review to five-year periods. The Tribunal could fairly infer from that directive, then, that semi-annual performance of essentially the same assignment would thwart Congress' definitive intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 82-97

IN THE

Supreme Court of the United States

October Term, 1982

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the Copyright Royalty Tribunal acted properly and did not act arbitrarily and capriciously in adjusting the compulsory license fee for jukeboxes as mandated by the 1976 Copyright Act, 17 U.S.C. § 101 *et seq.*

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BRIEF FOR RESPONDENT AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS IN OPPOSITION

STATEMENT OF THE CASE

This case is but one of many in which the courts find administrative agency actions to be within the scope of agency discretion. Here, as required by the 1976 Copyright Act, the Copyright Royalty Tribunal adjusted the compulsory license fee paid by jukebox operators for the right to perform copyrighted music. Its determination was upheld in all respects by the Court of Appeals. There is nothing novel or unique about this case that warrants review by this Court.

The Parties

The Copyright Royalty Tribunal

Prior to enactment of the 1976 Copyright Act, jukebox operators—unlike virtually all other commercial users of music—were not required to obtain a license to perform publicly copyrighted music. 17 U.S.C. § 1(e) (repealed 1976). The inequity of that exemption was recognized and corrected by the 1976 Copyright Act, which took effect January 1, 1978 and which established a compulsory license for such performances. 17 U.S.C. § 116. The annual compulsory license fee was initially fixed by statute at $8 per jukebox. 17 U.S.C. § 116(b)(1)(A).

The $8 fee was not related to any economic facts.* Congress recognized that the $8 fee would have to be adjusted, that an adjustment should be made promptly after the new law became effective, and that further periodic adjustments would be necessary as economic conditions changed.

Congress also recognized that it was not the proper body to make such adjustments. It established a new administrative agency within the Legislative branch, the Copyright Royalty Tribunal, and gave the Tribunal the

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* See, S. Rep. No. 94-473, 94th Cong., 1st Sess. 99 (1975):

> "The royalty rate of $8 per box is derived from action of the House of Representatives in 1967. That rate was adopted without the benefit of adequate analysis of the relevant economic data, and the rate has not been adjusted to reflect the significant inflation since 1967.
>
> This committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review. If such a review is to be precluded, the committee recommends that the royalty rate be now adjusted to provide a payment which is reasonable under existing conditions."

In essence, then, the $8 fee was a political compromise. See H. Rep. No. 94-1476, 94th Cong., 2d Sess. 113, 115 (1976), quoted in the Court of Appeals' decision, App. 3 (references are to the Appendix to the petition).

task, among others, of periodic adjustment of the jukebox compulsory license fee.* This case concerns the first such adjustment.

The Performing Rights Organizations

Congress expected the tens of thousands of composers, authors and publishers of music to be represented in these proceedings by three organizations it defined in the Copyright Act as "performing rights societies." 17 U.S.C. § 116(e)(3). These organizations are the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc. They represent, in the United States, virtually all owners of copyrighted music.

ASCAP, the oldest and largest, is an unincorporated membership association of writers and publishers of music.** Its members authorize ASCAP to license, nonexclusively, and on a blanket basis, the right of nondramatic public performance of their music. ASCAP licenses public performances by many types of music users, including broadcasting stations and networks, bars, grills, taverns, restaurants and nightclubs, background music operators, hotels and motels, concert promoters, and colleges and universities. All license fees collected are distributed to the members after deduction of operating expenses. For a description of the history and function of ASCAP, see *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979).

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* 17 U.S.C. § 804. The Tribunal's other duties include periodic adjustment of compulsory license fees for retransmissions of broadcasts by cable television (17 U.S.C. § 111), for the making of "mechanical" recordings of music (17 U.S.C. § 115), and for transmissions by public broadcasting (17 U.S.C. § 118). In addition, the Tribunal is empowered to distribute the jukebox and cable royalties to the various copyright owner claimants to those royalties.

** As ASCAP is an unincorporated membership association, no listing pursuant to Rule 28.1 of this Court's Rules is necessary.

BMI is a corporation owned and run by the broadcasting industry, the principal commercial user of music. It, too, licenses, on a blanket basis, its affiliates' nondramatic performing rights. *Id.*

SESAC is a family-owned corporation, licensing far fewer compositions than ASCAP or BMI.

The Jukebox Operators

Jukeboxes are usually owned by "operators," who place the machines in establishments open to the general public ("locations"). The operators are liable for compulsory license fees under the Copyright Law. 17 U.S.C. § 116(a) and (b). The operators typically also furnish other coin-operated devices to locations, including cigarette and other vending machines, pinball machines, video games and other amusement devices. The revenues from these machines are almost invariably split 50-50 between the operator and the location owner.

Many jukebox operators appeared in the Tribunal's proceedings through their trade association, the Amusement and Music Operators Association (AMOA).

Prior Proceedings

The Copyright Royalty Tribunal

The proceeding to adjust the initial $8 rate started automatically under the statute. 17 U.S.C. § 804(a)(1). The Tribunal held extensive hearings in which ASCAP, BMI, SESAC and the AMOA participated. A three-member majority of the Tribunal determined that an annual per box fee of $50 was reasonable. Since the rate would be in effect for 10 years the statute, from 1981 through 1990, the decision provided for an inflation adjustment. 17 U.S.C. § 804(a)(2)(C). The majority also concluded that this "reasonable" fee should not be put into effect immediately,

but rather should be phased-in. Thus, the majority's determination of annual fees for the next 10 years was:

1981	$ 8	
1982-83	25	
1984-86	50	
1987-90	50	plus difference in Consumer Price Index between February 1981 and August 1986.

Two Tribunal members dissented. Commissioner Garcia would have set the $25 and $50 fees at $30 and $60. Chairman James would have set the fee at $130, effective immediately, in 1981.

The Court of Appeals

Both ASCAP and the AMOA appealed the Tribunal's decision to the Seventh Circuit. We appealed on two grounds: that the $50 fee fell below the $70-$130 "zone of reasonableness" established by the record and that the $50 fee determined to be "reasonable" should have been made effective immediately, and not phased-in over three years.

The AMOA argued that the $50 fee was too high for a variety of reasons, including those on which its petition is based.

The Court of Appeals rejected both appeals. It concluded "that the Tribunal's final rule is lawful in all respects." App. 2.

REASONS FOR DENYING THE WRIT

I. The Tribunal's Determination Was Factual; It Raises No Legal Issue Worthy of This Court's Attention

The statute gives detailed and explicit guidance to the Tribunal as to the objectives it must achieve in adjusting the compulsory license fees. They are set forth in 17 U.S.C.

§ 801(b)(1)(A)-(D). App. 65. The Tribunal dutifully analyzed the evidence in light of those objectives. App. 54-57. The Court of Appeals then examined the Tribunal's determination with specific reference to those objectives and found it satisfactory. App. 3-4, 8-9.

The Tribunal concluded that analogous marketplace prices formed the best basis for determination of a reasonable license fee, subject to limitations. App. 52. The Court of Appeals endorsed this concept, stating that other uses of analogous marketplace prices in setting regulated prices "have been repeatedly endorsed as appropriate ratemaking devices." App. 26. The Tribunal did not act arbitrarily and capriciously in using these analogies as benchmarks. App. 27.

The AMOA complains that the $50 fee is too high and wants the $8 fee left unchanged. But the Tribunal found that the AMOA's evidence, introduced to justify maintaining the status quo, was not credible: "The Tribunal finds that the case presented by the AMOA, including the industry survey, has failed to provide reliable data concerning the operating expenses, revenues or return on investment of jukebox operators." App. 51.

The AMOA, of course, cannot hope to overturn this factual assessment of its evidence. It therefore wraps its argument in the cloak of a "legal" theory: the Tribunal, the AMOA claims, has determined a "monopoly price" for a use to which "Congress explicitly denied monopoly protection." The "monopoly price" is allegedly that which would be charged in the marketplace in the absence of a compulsory license.

The AMOA's cloak of legal theory is spun from whole cloth: Congress has neither explicitly nor implicitly granted second-class property rights to copyright owners for jukebox uses, nor is there any "monopoly pricing" involved here. There is absolutely nothing in the statute or legisla-

tive history that even hints at the notion that Congress expected the Tribunal to set a different value for copyrighted works subject to a compulsory license than would be arrived at in the marketplace.*

II. Congress Recognized that This Ratemaking Process Had a Collective Nature, and that Inquiry Into the Internal Distribution Procedures of Performing Rights Societies Was Not Warranted

The AMOA complains that the Tribunal made no inquiry into the finances of individual songwriters in applying the statutory objective of a "fair return" to copyright owners. 17 U.S.C. § 801(b)(1)(B). Performing rights, however, are licensed on a collective, blanket basis through the performing rights societies.**

Congress recognized the collective nature of this performing rights licensing. The statute specifically mandates distribution of the jukebox compulsory license fees to "performing rights societies." 17 U.S.C. § 116(e)(4)(B). It specifically defines ASCAP, BMI and SESAC as "performing rights societies." 17 U.S.C. § 116(e)(3). The Tribunal found that the Copyright Act recognizes that "fair return" can here be measured on a collective basis:

> "It is thus our opinion that the Act recognizes a practical necessity for individual creators of music to adequately protect their performing rights and for users, such as the jukebox industry, to conveniently acquire performing rights. We conclude, therefore, that the 'fair return' to music copyright owners, *i.e.*,

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* The AMOA's claim that the Tribunal erred by placing "complete reliance on monopoly [marketplace] price analogies" proves too much. (Pet. 14.). If the Tribunal had completely relied on the marketplace analogies and set a true marketplace price for the jukebox compulsory license, that price would have been in the $70-$130 range we suggested, not the $50 fee actually set. App. 25.

** Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

> the reasonable value of the performing right can be established on a collective basis." App. 50. See, generally, App. 48-50.

The Court of Appeals found that the Tribunal's conclusions were correct. App. 29-30. Indeed, the Court of Appeals went further than the Tribunal did:

> "[W]e believe it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material. See *Permian Basin Area Rate Cases*, 390 U.S. at 805-13" App. 30. See, App. 7-8.*

The conclusions of the Tribunal and the Court of Appeals are in accord with this Court's decision in *Broadcast Music, Inc.* v. *CBS*.** There, this Court cited the very jukebox compulsory license at issue here as an example of Congressional endorsement of the collective blanket license.***

III. There Is No Question of General Importance Presented Warranting Review By This Court

None of the other points made by the AMOA warrants review by this Court. The Tribunal acted well within its discretion in setting an automatic one-time inflation adjustment. Indeed, it would be quite unfair, and certainly not "reasonable," for a rate set by the Tribunal in 1980 dollars to remain unadjusted when the Tribunal knew that the value of those 1980 dollars was being substantially eroded year after year.

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* The AMOA's notion that costs and investments of individual songwriters can be measured against their revenues is a silly one. A song may take only a minute to create, and yet be very valuable over a long period of time. How can one measure the "costs" of creative genius?

** 441 U.S. 1 (1979).

*** Id., 15.

There is ample precedent for such an adjustment: The Tribunal used an annual CPI inflation adjustment in the very first proceedings it conducted.* And, the Court of Appeals for the District of Columbia Circuit has approved of such an automatic adjustment in still other Tribunal proceedings.** Indeed, the very fact that the fees will not, by law, be reviewed for ten years argues *for* an automatic inflation adjustment. As the Court of Appeals here said:

> "[A] cost of living or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act." App. 22.

Contrary to the AMOA's argument, neither the Tribunal nor the Court of Appeals has departed from long-settled principles of copyright and administrative law.

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* Public Broadcasting Rate Proceedings, 43 FR 25068 (June 8, 1978); see 37 CFR § 304.10.

** Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 18 (D.C. Cir. 1981). The court disapproved of an adjustment mechanism that would have required an exercise of the Tribunal's discretion between the dates set by statute for rate reviews, but endorsed an automatic adjustment mechanism.

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, New York
September 17, 1982

Respectfully submitted,

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OCTOBER TERM, 1981

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Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed a decision of the Copyright Royalty Tribunal as supported by substantial evidence and not arbitrary or capricious?

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Other Authorities

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S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975) ... 2,4

No. 82-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

This case concerns the copyright license fee paid by operators of coin-operated phonorecord players, commonly known as "jukeboxes," for the commercial performance of musical works. A group of commercial jukebox operators, represented by their trade association, would prefer to pay a lower fee than the royalty found to be reasonable by the Copyright Royalty Tribunal, the federal administrative agency charged with setting the rate. The operators' writ of certiorari asks this Court to review a unanimous decision of the United States Court of Appeals for the Seventh Circuit affirming the agency's decision in all respect.

For decades jukebox operators escaped any liability for the public performance of copyrighted music due to a special exemption contained in the Copyright Act of 1909. 17 U.S.C. § 1(e) (1976) (repealed). The Copyright Revision

Act of 1976, 17 U.S.C. § 101, *et seq.*, finally removed this exemption and permitted music writers and publishers compensation for use of their works by the jukebox industry.[1] The vehicle for acquisition of performance rights over jukeboxes is the compulsory license. 17 U.S.C. § 116(a)(2). Congress established an initial compulsory license fee of $8.00 per jukebox per year, to commence in 1978. However, it noted expressly that this rate reflected a political compromise adopted in 1967. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, 115 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975). Therefore, Congress required the Copyright Royalty Tribunal, an administrative agency created under the 1976 Act, to reexamine the rate in 1980, 17 U.S.C. § 804(a)(1), in accordance with specified guidelines. 17 U.S.C. § 801(b)(1)(A)-(D).

Pursuant to the statutory requirements, the Tribunal, in January, 1980, commenced rulemaking proceedings and held evidentiary hearings. On January 5, 1981, the Tribunal issued a detailed decision concluding that application of the statutory criteria required a license fee of $50.00 per jukebox per year. The Tribunal found that the fee should be phased-in, starting at $25.00 for 1982 and 1983, then $50.00 for the years 1984 through 1986. The Tribunal also determined that the $50.00 fee should be adjusted in 1987 to reflect changes in the Consumer Price Index. (App. 57.)

On April 16, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the Tribunal's decision in all respect. (App. 1.)

The Parties

Petitioner Amusment and Music Operators Association ("AMOA") is a trade association of operators, manufacturers,

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[1] The relevant provisions of the Copyright Revision Act of 1976 are reprinted in the appendix to the Amusement and Music Operators Association petition at pp. 64-66. References to the AMOA appendix are given by the designation "App." followed by the appropriate page numbers, *e.g.*, (App. 64-66). The decision of the Court below is reprinted in the appendix. (App. 1-32.) The decision of the Tribunal is also reprinted in the AMOA appendix. (App. 35-63.)

and distributors of jukeboxes and other coin-operated amusement devices. The Copyright Royalty Tribunal is a federal administrative agency which Congress established in 1976 "to make determinations concerning the adjustment of reasonable copyright rates." 17 U.S.C. § 801(b)(1). Respondents Broadcast Music, Inc. ("BMI") and American Society of Composers, Authors and Publishers ("ASCAP") are music performing rights societies, organizations that license the public performance of non-dramatic musical works on behalf of the copyright owners. The Act provides specifically that the royalty fees are to be distributed to the performing rights organizations. 17 U.S.C. § 116(c)(4)(B).

Statutory Background

By statutory exemption, jukebox operators for nearly seventy years were not required to compensate writers and publishers for the commerical performance of their copyrighted musical works. The Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*, eliminated this exemption and established a mechanism to compensate music copyright owners for the public performance of their works by jukebox operators. Under the Act, jukebox operators must secure a compulsory license by filing annually an application with the Register of Copyrights and depositing the required license fee for each jukebox. 17 U.S.C. § 116(b)(1). These fees are then distributed (after deduction of administrative expenses) to the performing rights organizations (or to copyright owners not affiliated with performing rights organizations). 17 U.S.C. § 116(c).

Congress adopted an initial license fee of $8.00 per jukebox per year and required payment beginning in 1978. The $8.00 fee level, "represents a compromise figure adopted in 1967, and, as a compromise, it is acceptable as the rate to be specified in Section 116 . . . [The House Judiciary] Committee has accepted the $8 jukebox royalty in the expectation that it would subject to periodic review." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, 115 (1976). The Senate report was in accord:

> [T]he Committee has been greatly influenced by the desire to conform to the rate provided in the copy-

> right legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the Committee has endeavored to facilitate the progress of this legislation by preserving to the extent possible in view of other provisions of this bill, the rate adopted by the House of Representatives.

S. Rep. No. 473, 94th Cong., 1st Sess. 96-97 (1975).

The Act also established the Copyright Royalty Tribunal as the administrative agency "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in [Section] . . . 116." 17 U.S.C. § 801(b)(1). The Tribunal was directed to adopt a rate "calculated to achieve" several specified objectives. 17 U.S.C. §§ 801(b)(1)(A)-(D). Because the Congressional committees disavowed expressly any notion that the $8.00 fee was reasonable or calculated to achieve the goals of Section 801(b), Congress required the Tribunal to undertake a complete review of the rate in 1980, only two years after the compromise rate became effective. 17 U.S.C. §§ 804(a)(1). In addition to the mandatory 1980 review, the Act provides that adjustment proceedings may be held upon petition by any person having a significant interest in the outcome "in 1990 and in each subsequent tenth calendar year." 17 U.S.C. § 804(a)(2)(C).

Tribunal Proceedings

In accordance with the statute, the Tribunal initiated the royalty adjustment proceeding in January, 1980 by publication of a notice of rulemaking in the *Federal Register*. (45 *Fed. Reg.* 62, March 28, 1980.) Full evidentiary hearings were conducted, during which both direct and rebuttal cases were heard.

It was AMOA's position that the royalty rate should be frozen at the $8.00 compromise figure. (App. 44.) AMOA offered, as the centerpiece of its case, its own survey of the jukebox industry purporting to show that the industry was facing difficult financial circumstances. (App. 42.) AMOA also offered its own standard for analysis of proposals to

increase the rate: an increase could be justified only after rates of return were calculated for "individual musical works based on [a comparison of] the time and expense incurred by the songwriters for each one, together with a value inexplicably derived from the placement of a work on a popularity chart." (App. 48-49.) As a first step in acquiring this data, AMOA sought an investigation of royalty distributions to the individual members and affiliates of each of the performing rights organizations. *Id.*[2]

In applying the statutory criteria, the Tribunal discounted the AMOA economic survey, in part because the record raised "significant questions as to the survey's methodology and objectivity, as well as the nature and scope of the data provided." (App. 51.) Significantly, results of the survey differed sharply from independent surveys undertaken by two separate jukebox industry trade publications. Based on the data gathered in these independent surveys, the Tribunal concluded that "it would be reasonable for some operators to be paying more than $50.00," especially if "a fee schedule based on such factors as per box revenue or the number of boxes owned by a particular operator" was adopted. (App. 53.) Moreover, anecdotal evidence offered by industry spokesmen did "not provide a basis for forming any representative picture of the jukebox industry nor [did] it create a foundation for the industry's claim of economic hardship." (App. 52.) Nevertheless, according to the Tribunal, the record did establish that "some jukebox operators function on a narrow profit margin, and that certain jukeboxes produce modest revenues." (App. 53.) In accordance with the statutory objectives "to afford the copyright user a fair income," contained in Section 801(b)(1)(B), and "to minimize any disruptive impact on the structure of the industries," contained in Section 801(b)(1)(D), the Tribunal factored these findings into its rate determination. (App. 55.)

[2] In the petition, it is claimed that AMOA sought only an analysis of the "collective costs and financial condition" of music writers. (AMOA petition at p. 5.) In fact, AMOA sought below an investigation of *all* payments made to individual composers and an analysis of the "cost" of producing a particular composition. Thereafter, AMOA would urge the Tribunal to calculate a "rate of return" based on the "values" of *individual* compositions as reflected in industry trade charts.

However, the Tribunal rejected AMOA's contention that the objective "afford[ing] the copyright owner a fair return," specified in Section 801(b)(1)(B), required the calculation of rates of return for each individual piece of music. The Tribunal found that this objective "reflect[ed] the broad goal of the legislation to insure that creators are fairly compensated through adoption of license fees establishing a reasonable value for the use of Copyright works." (App. 49.) In view of specific provisions in the Act authorizing distribution of royalty fees to the performing rights organizations, the Tribunal concluded that the criterion "is not a directive authorizing the Tribunal to investigate individual member's or affiliate's collections from the performing rights organizations." *Id.*

Other evidence did shed light on the "fair return" to the copyright owner. Expert economic testimony suggested that the statutory objectives would be met if the Tribunal modeled the jukebox license fee after royalty fees paid for analogous public performance rights. (App. 37-38). Evidence was submitted demonstrating that restaurants, bars and other establishments of the type likely to employ jukeboxes paid royalty rates of at least $140 per year for performance of musical works utilizing tape recorders, record players and jukeboxes not subject to compulsory license. (App. 39.) The evidence also showed that jukebox royalty fees in nineteen foreign countries averaged approximately $96.00 per box annually. (App. 40.)

In its decision, the Tribunal acknowledged the relevancy of these marketplace analogies to its analysis. However, it recognized that its rate determination must be founded in application of the statutory guidelines and "cannot be directly linked to marketplace parallels." (App. 52-53). Noting that the analogies suggested were "subject to limitations and distinguishing features," the Tribunal concluded that this evidence must "be weighed together with the entire record and the statutory criteria." *Id.* Viewed in this light, the Tribunal found that marketplace parallels could serve as an appropriate "benchmark" in setting the reasonable rate. (App. 53.) In the final analysis, the Tribunal reasoned that the statutory objectives would be achieved by tailoring rates suggested by marketplace analogies to reflect their distinguishing features and to ac-

commodate the economic requirements of small or marginal operators. (App. 53.)

Thus, the royalty rate adopted by the Tribunal was substantially lower than the analogous license fees and was to be phased-in and later adjusted for a change in the cost of living. The Tribunal concluded that the cost of living adjustment was consistent with the legislative history of the Act and required in this case in order to insure continuing compliance with the statutory criteria throughout the decade. (App. 54.)

The Tribunal also found that the increased rate would meet the additional statutory criteria. It would "encourage[ ] . . . creation by songwriters and exploitation by music publishers, and so maximize availability of works to the public" pursuant to Section 801(b)(1)(A). *Id.* Furthermore, applying Section 801(b)(1)(C), no basis was found for concluding that jukebox owners make any distinctive contribution to the opening of new markets. Therefore, the Tribunal concluded that the equities weighed in favor of higher renumeration to copyright owners. (App. 55-56.)

Appellate Court Review Proceedings

AMOA and ASCAP each filed Petitions for Review of the Tribunal's decision in the United States Court of Appeals for the Seventh Circuit.[3] SESAC did not appear as a party in the Court of Appeals.

AMOA challenged the Tribunal's decision on several grounds, three of which were reasserted in its petition for writ. First, AMOA challenged the use of the marketplace analogies as a factor in the rate determination arguing that "the allegedly analogous fees in each situation were established under the protection of government-granted monopoly rights (which exist presumably in the form of copyright protection) rather than

[3] ASCAP argued that the $50.00 fee was outside of the "zone of reasonableness" suggested by the marketplace analogies and that the lowest reasonable rate was $70.00. BMI appeared as a party-respondent supporting the rule as against the AMOA challenge, but took no position as to ASCAP's contentions.

in a free competitive market." (App. 26.) Second, AMOA argued that the Tribunal erred in refusing, for the purpose of assessing a "fair return," to adopt its complex methodology requiring calculation of time and expenses incurred by songwriters, in the creation of individual musical works, assignment of values to the individual works based on popularity charts and comparisons of this information with data culled from the records of the performing rights organizations concerning payments for individual songs.[4] (App. 29-30.) Third, AMOA contended that the Tribunal's decision to include a cost of living adjustment in the royalty rates violated the Act. (App. 22-23.)

The Court rejected AMOA's contentions and affirmed the Tribunal's decision as "fully supported by substantial evidence" (App. 27), and "lawful in all respects." (App. 2.)

First, the Court held that "the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment." (App. 26.) The Court pointed out that "it is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissability." *Id.* The Court also noted that the marketplace analogies "presented the most credible and relevant evidence before the Tribunal." (App. 26-27.) Second, the Court held that the Tribunal properly declined to adopt AMOA's methodology for assessing a "fair return" because "the inquiries sought by AMOA into the internal distribution processes of the performing rights societies are irrelevant to the purposes of the Act." (App. 30.) Thus, "it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material." *Id.* Third, the Tribunal held that a cost of living adjustment "designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively

[4] *See* footnote 2, *supra*.

supported by the language of the Act." (App. 22.) The Court found that "both the phase-in mechanism and the inflation adjustment, which cut in opposite directions," were consistent with the broad statutory criteria and "demonstrate a flexibility with which Congress intended to endow the Tribunal in making its determinations." *Id.* The Court concluded, based on a review of the record, that "the addition of an automatic inflation factor was necessary to achieve the goal of the Act." (App. 32.)

In summary, the Court held that "the Tribunal did not act either unreasonably or unlawfully by establishing a $50.00 royalty fee which would be implemented in stages and subject to future inflationary adjustments." (App. 31.)

REASONS WHY THE WRIT SHOULD BE DENIED

This case involves a routine exercise of discretion by an expert federal agency – the establishment of a reasonable rate supported by substantial evidence. The Copyright Royalty Tribunal has set such a reasonable rate for music performances over commercial jukeboxes. Its decision has been sustained by the Court of Appeals. The rate established may not be to AMOA's liking; however, that alone hardly merits issuance of a writ.

This Court has established guidelines for the consideration of a petition for a writ. *See* 28 U.S.C. §17. A writ of certiorari is not issued as a matter of right and is granted only in special circumstances. The AMOA petition fails to explain why the questions it has raised achieve such status and require the special attention of this Court. Indeed, Rule 17 escapes mention entirely in the AMOA petition.

As will be shown, no important question of federal law has been decided by the court below. Nor does the decision of the court below conflict with decisions of other circuits or of this Court.

I. The Decision Below Does Not Involve A Question of Federal Law Sufficiently Important to Merit Review by this Court

The AMOA petition requests further review of the Tribunal's determination of a royalty rate to be paid by commercial jukebox operators for the public performance of music. The issues raised relate solely to Section 116 of the Copyright Revision Act of 1976, 17 U.S.C. § 116, which addresses jukebox rate determinations. The issues raised do not bear on any of the Tribunal's other responsibilities under the Act; nor do they affect the application of copyright principles generally. This section is relevant only to music composers and publishers, represented by the performing rights organizations, and the commercial jukebox operators. By the terms of the statute itself there are no other potential litigants which would benefit from this Court's review.

Not only are the issues raised by the AMOA petition applicable only to this specific proceeding, the questions presented are exceedingly narrow. AMOA does not challenge the application of a compulsory license to jukebox performances. Nor does it challenge the authority of the Tribunal to review the royalty rate schedule. Instead, AMOA questions only whether the Tribunal has properly interpreted and given sufficient weight to specific facts in reaching its decision. AMOA suggests improperly that the Tribunal does not have the flexibility and discretion normally associated with administrative ratemaking under historic statutory and case precedent.

The real question of law raised by AMOA already has been settled by this Court: what are the limits of agency discretion in rate determinations? This Court has established the standard in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). Thus, courts are without authority to set aside a particular rate determination if it lies within a "zone of reasonableness," 390 U.S. at 767, and reflects "reasoned consideration of each of the pertinent factors," *Id.* at 792.

Ignoring such criteria, AMOA presents three arguments. First, it argues that the court below erred in sustaining the

Tribunal's decision to employ marketplace analogies in deriving a reasonable rate. Second, AMOA asserts that the court below should have required the Tribunal to have calculated a "fair return" for individual music writers. AMOA proposes a complex costing methodology involving an assessment of costs incurred by song writers in creating musical works and an investigation of distribution methods employed by the performing rights organizations. Third, AMOA asserts that the court below erred in approving the Tribunal's consideration of prospective economic conditions through adoption of a rate schedule which includes an automatic, one-time inflation adjustment. Thus, AMOA argues that the Tribunal *must*, by law, reject evidence concerning marketplace analogies and inflationary trends and accept evidence concerning the costs incurred by music writers and the distribution methods employed by the performing rights organizations. However, as *Permian Basin* instructs, the Tribunal is not so limited. The statutory guidelines give the Tribunal a broad focus, requiring that it take into account the requirements of copyright owners, copyright users and the general public. The Tribunal is not confined to consideration of specific types of evidence in the application of these broad guidelines.

Thus, the Tribunal's consideration of marketplace analogies, as one factor in establishing the rate, falls properly within the realm of its discretion. The Tribunal chose to utilize these analogies only as benchmarks, noting differences in the respective marketplace and the regulatory environments. Therefore, there is no basis for AMOA's claim that the Tribunal placed "complete reliance" on the analogies and ignored the statutory guidelines. In fact, the Tribunal departed substantially from the royalty rate applied in the analogous markets in order to adopt a rate which would accommodate the economic requirements of the jukebox industry.

The Tribunal also was well within its discretion rejecting AMOA's complex methodology for calculating an individual music writer's rate of return. There is no indication in either Section 116 or its legislative history of a requirement that the Tribunal must undertake the cost analysis suggested by AMOA. Rather, the statutory guideline cited by AMOA – "to

afford the copyright owner a fair return for his creative work" – reflects the broad goal of the legislation to insure that creators are fairly compensated through license fees. The Tribunal found the AMOA approach to be "inexplicable." The Court of Appeals concluded that it was both "impossible" and "improper." In any event, this is clearly not an issue of any public consequence or moment.

Neither does the inflation adjustment raise a question meriting this Court's attention. Section 801(b)(1) directs the Tribunal "to make determinations concerning the adjustment of reasonable copyright royalty rates." 17 U.S.C. §801(a)(1). Nothing in this language precludes the Tribunal from ordering such an adjustment in order to maintain the real value of the rate. On the contrary, precedent supports such Tribunal action. As stated by the District of Columbia Court of Appeals in its review of the Tribunal's decision concerning a new compulsory license fee for the mechanical reproduction of copyrighted works:

> We do not suggest that the Tribunal must set a flat rate that will remain in effect until the next rate determination in 1987. If economic conditions make it implausible that any numerical rate will remain reasonable over the next seven years, then we see nothing in the statute precluding the Tribunal from adopting a reasonable mechanism for automatic rate changes in interim years. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1968). But, whatever the scope of the Tribunal's adjustment powers may be, the mechanism chosen must be well-determined and beyond the Tribunal's discretion, and judicial review of the reasonableness of the chosen mechanism must be available as part of the review of the Tribunal's statutory rate proceeding.

Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 17 (1981). The Tribunal's decision to institute a one-time, automatic adjustment of the

royalty rate based on changes in the Consumer Price Index is in full accord with this principle.

II. The Ruling of the Court Below Does Not Conflict with Precedent

AMOA asserts that the decision below conflicts with the decision of the District of Columbia Circuit in *Recording Industry* and the decision of this Court in *Permian Basin Area Rate Cases, supra*.

AMOA claims a conflict in principle with *Recording Industry* because the Tribunal in that case received in evidence what AMOA terms "substantial empirical studies of economic costs and well-being of copyright owners." AMOA Petition at p. 19.

In fact, the holding in *Recording Industry* parallels the Court decision below in finding that the statutory guidelines do not require the application of traditional cost-of-service ratemaking:

> the "fairness" of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service ratemaking; a broader inquiry is called for. Under these circumstances, a court owes considerable deference to the Tribunal's ultimate policy choices.

662 F.2d at 9 (footnote omitted). Contrary to AMOA's insinuation, no evidence was placed before the Tribunal in the *Recording Industry* proceeding concerning costs incurred by individual copyright owners or the individual rates of return to music writers. Thus, no conflict exists in the circuits.

The alleged conflict with *Permian Basin* is not explained at all. This Court's decision in *Permian Basin* has been discussed in Section I. *Permian Basin* does not require the utilization of any particular methodology in a rate determination. 390 U.S. at 800. As indicated, however, the rate must fall within a "zone of reasonableness" and reflect "reasoned consideration of each of the pertinent factors." The Court below carefully

considered the application of the statutory criteria by the Tribunal and concluded properly that "the Tribunal lawfully adopted a rate that falls within the zone defined by the criteria of Section 801(b)(1)." (App. 25, n. 11.)

CONCLUSION

As indicated herein, AMOA has failed to meet the threshhold requirements for the consideration of this matter by the Court. AMOA has failed to identify any issue of legal consequence or national importance. Nor has AMOA identified a judicial conflict which requires reconciliation by this Court. The decision below was not arbitrary and capricious, and was fully supported by record evidence. Accordingly, the instant petition should not be granted.

Respectfully submitted,

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